

No. 91-871-CFX
Status: GRANTED

Title: Bath Iron Works Corporation, et al., Petitioners
v.
Director, Office of Workers' Compensation Programs,
etc.

Docketed:

November 25, 1991

Court: United States Court of Appeals for
the First Circuit

Counsel for petitioner: Gillis, Kevin M.

Counsel for respondent: Solicitor General, Lupton, Ronald W.

Mailing Label - 11/25/91 Service date - 11/26/91

Entry	Date	Note	Proceedings and Orders
1	Nov 25 1991	G	Petition for writ of certiorari filed.
3	Jan 15 1992		Order extending time to file response to petition until February 18, 1992.
4	Feb 14 1992		Order further extending time to file response to petition until March 3, 1992.
6	Mar 3 1992	X	Brief of respondent Director, Office of Workers' Compensations Programs, etc. filed.
5	Mar 4 1992		DISTRIBUTED. March 20, 1992
7	Mar 23 1992		Petition GRANTED. *****
8	May 7 1992		Brief of petitioners Bath Iron Works Corporation, et al. filed.
9	May 11 1992	G	Motion of petitioners to dispense with printing the joint appendix filed.
10	May 18 1992		Motion of petitioners to dispense with printing the joint appendix GRANTED.
11	May 26 1992	G	Motion of the Solicitor General for divided argument filed.
12	Jun 8 1992		Motion of the Solicitor General for divided argument GRANTED.
13	Jun 8 1992		Brief of respondent Employee filed.
14	Jun 8 1992		Record filed.
		*	Partial proceedings U. S. Court of Appeals for the First Circuit.
15	Jun 11 1992		Brief of respondent Director, Office of Workers' Compensation Programs filed.
16	Jul 14 1992		CIRCULATED.
17	Jul 16 1992	X	Reply brief of petitioners filed.
18	Jul 31 1992		Record filed.
		*	Original proceedings Benefits Review Board-U.S. Department of Labor.
19	Aug 21 1992		SET FOR ARUGUMENT WEDNESDAY, NOVEMBER 4, 1992. (2ND CASE
20	Nov 4 1992		ARGUED.

91-871

No. _____

Supreme Court, U.S.
FILED

NOV 25 1991

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In The
Supreme Court of the United States
October Term, 1991

BATH IRON WORKS CORPORATION and
COMMERCIAL UNION INSURANCE COMPANIES,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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November 25, 1991

QUESTION PRESENTED FOR REVIEW

Did the First Circuit err in holding that benefits for loss of hearing claimed by retired workers under the Longshore and Harbor Workers' Compensation Act should be awarded under 33 U.S.C. § 908(c)(13), which governs claims for loss of hearing, rather than under 33 U.S.C. § 908(c)(23), which governs claims by retirees?

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¹ All parties to the proceeding below appear in the caption of the case with the exception of the Employee, Mr. Ernest C. Brown. Bath Iron Works is a Maine corporation whose common stock is owned by Fulcrum II, a New York partnership, and Prudential Insurance Company of America.

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OPINIONS BELOW

The appendix contains the decree of the First Circuit Court of Appeals which was reported at 942 F.2d 811 (1st Cir. 1991) (App-1). The Decision and Order *En Banc* of the Benefits Review Board dated November 26, 1990 is cited at 24 BRBS 89 (1991) and is reproduced at App. 21. The unreported Decision and Order of the Administrative Law Judge is dated October 3, 1988 and is reproduced at App. 31.

GROUND'S ON WHICH JURISDICTION INVOKED

The decree issued by the First Circuit was entered on August 27, 1991 (App. 1). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions of the Longshore and Harbor Workers' Compensation Act that are at issue in this case concern scheduled benefits for loss of hearing, benefits for retirees and time of injury. The provisions, which are reproduced at "Appendix D" (App. 48), include the following:

- 33 U.S.C. §902(10)
- 33 U.S.C. §908(c)(1-13, 21, 23)
- 33 U.S.C. §910(d)(2)
- 33 U.S.C. §910(i).

STATEMENT OF THE CASE

Mr. Ernest C. Brown worked as a riveter and chipper for Petitioner Bath Iron Works (hereinafter "BIW") in Bath, Maine until his retirement in 1972. In 1985, he filed a claim for permanent partial disability benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "the Act"). He alleged binaural loss of hearing caused by occupational noise through 1972.

The Office of Administrative Law Judges of the Department of Labor exercised jurisdiction of the claim under 33 U.S.C. §901 *et seq.* An Administrative Law Judge held on October 3, 1988 that Mr. Brown's time of injury was September 6, 1985 and that benefits were payable under 33 U.S.C. §908(c)(13) (App. 37, 40). BIW appealed to the Benefits Review Board of the Department of Labor (hereinafter "Board"). The Board affirmed on November 26, 1990, but two of its five members wrote separately to express the belief that benefits should instead be calculated under 33 U.S.C. §908(c)(23) (App. 27-30).

BIW filed a Petition for Review with the First Circuit under 33 U.S.C. §921(c). The Respondent, Director of the Office of Workers' Compensation Programs of the Department of Labor (hereinafter "Director"), also participated in the appeal. The First Circuit affirmed the Board, but disagreed with the Board's reasoning. The Court agreed with the Director that the time of injury occurred in 1972 when Mr. Brown was last exposed to loud noise (App. 19).

ARGUMENT

1. Introduction.

Mr. Brown is one of thousands of American shipyard workers to sustain a loss of hearing after years of exposure to loud noise. Claims for loss of hearing are routinely processed at BIW and every other large shipyard in this country.

Unfortunately, the Act is now subject to no fewer than three different interpretations when the worker is retired. The First Circuit, in this case, has instructed employers to process these claims one way, the Fifth and Eleventh Circuits have construed the Act a second way, while the Board applies yet a third construction of the Act to the remaining circuits.

2. Overview of Statutory Scheme.

The First Circuit "unscrambled" the statutory provisions at issue by first identifying three "systems" of compensation for permanent partial disability. Most body parts are "scheduled" under 33 U.S.C. §§908(c)(1-20). In particular, total loss of hearing is worth 200 weeks of benefits. 33 U.S.C. §908(c)(13). The total benefit equals two-thirds of the employee's average weekly wage times the percent of hearing loss times 200 weeks. 33 U.S.C. §908(c). For instance, two-thirds of a \$300 average weekly wage (\$200) times 50 percent loss of hearing times 200 weeks equals a single payment of \$20,000.

The second "system" is not at issue in this case. It awards benefits as a function of lost earning capacity for

injuries *not* specifically scheduled. 33 U.S.C. §908(c)(21). Back injuries are a common example of this "system".

The third "system" was enacted by Congress in 1984. Prior to 1984, retirees could not collect compensation for loss of hearing or certain other diseases because they could not demonstrate a loss of earning capacity after retirement. As a result, Congress added four "retiree" provisions to the Act: 33 U.S.C. §§910(d)(2), 910(i), 908(c)(23) and portions of §902(10). *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088, 1090-91 (5th Cir. 1990).

The 1984 amendments allowed a limited benefit for diseases which do not become apparent until after retirement. 33 U.S.C. §908(c)(23) awards compensation based upon two-thirds of the retiree's average weekly wage times the percentage of whole body permanent impairment determined under American Medical Association guidelines. The benefits are payable weekly for the duration of the impairment, which is usually for life. The amendment applies "[n]otwithstanding paragraphs (1) through (22)". Consequently, on its face, the "system three" provision for a retiree applies "notwithstanding" the "system one" schedule for loss of hearing at 33 U.S.C. §908(c)(13).

For example, a 50 percent loss of hearing equals an 18 percent whole person impairment under tables supplied by the American Medical Association. Eighteen percent of two-thirds of a \$300 average weekly wage equals \$36 per week.

However, as noted by the First Circuit, 33 U.S.C. §908(c)(23) applies only where the average weekly wage is determined under 33 U.S.C. §910(d)(2). That provision

governs occupational disease claims where the time of injury as determined under 33 U.S.C. §910(i) occurs after retirement.² 33 U.S.C. §910(i), in turn, mandates that for disability "due to an occupational disease which does not immediately result in death or disability" the time of injury is the date on which the employee becomes or should become aware of the relationship between the employment and his disease.

These provisions raise two important questions. First, the time of injury is important because it determines the average weekly wage upon which benefits are calculated. In this case, Mr. Brown's time of injury could be 1972, when he was last exposed to noise, or 1985 when he became aware of his disease. If the time of injury is 1985 under 33 U.S.C. §910(i), then a second issue is whether Mr. Brown is entitled to a single lump sum based upon a percentage of hearing loss under 33 U.S.C. §908(c)(13), or weekly benefits based upon whole body impairment under 33 U.S.C. §908(c)(23).

3. Three Accepted Solutions to the Questions.

a. The Board's Solution.

The Board has held for years that the time of injury is the post-retirement date of awareness under 33 U.S.C. §910(i), but that a lump sum benefit must be paid under

² The average weekly wage under 33 U.S.C. §910(d)(2) is the employee's own wage if the time of injury falls within one year of retirement. It is the national average weekly wage if the injury occurs more than one year after retirement.

33 U.S.C. §908(c)(13) rather than weekly payments under 33 U.S.C. §908(c)(23). The Board defends this result even though 33 U.S.C. §908(c)(23) applies "[n]otwithstanding paragraphs (1) through (22)".

b. The Fifth and Eleventh Circuits' Solution.

In *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990), the Fifth Circuit agreed with the Board that the time of injury for retired hearing loss claimants is the date of awareness under 33 U.S.C. §910(i). However, in reversing the Board, the Fifth Circuit held that weekly benefits must be paid under 33 U.S.C. §908(c)(23).

The Eleventh Circuit recently agreed that the time of injury for retired hearing loss claimants is the date of awareness under 33 U.S.C. §910(i), rather than the date of last exposure. *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561 (11th Cir. 1991)³.

c. The First Circuit Solution.

The First Circuit has now turned confusion to chaos by adopting yet a third solution. The First Circuit agreed with the Director that the time of injury for *all* retired hearing loss claimants is the time of last exposure and that 33 U.S.C. §910(i) does not apply. Thus, the First Circuit agreed with the Board that benefits should be

³ The Eleventh Circuit decision is dated June 24, 1991, after the June 5, 1991 date on which the First Circuit heard arguments in this case.

calculated under 33 U.S.C. §908(c)(13), but it disagreed as to the time of injury and average weekly wage.

Significantly, the First Circuit freely admitted that the Fifth Circuit case was "identical to this one" and that "[w]e * * * reach a conclusion different from that of the Fifth Circuit" (App. 11). To further confuse matters, the Board acknowledged in this case that it would follow the Fifth Circuit *only* in that Circuit (App. 27-28). It is nearly certain, therefore, that the Board will now follow this precedent in the First Circuit, the Fifth and Eleventh Circuit decisions in those Circuits, and its own "hybrid" solution in all other Circuits.

4. Reasoning of First Circuit is Flawed.

One reason that this conflict should be resolved by this Court is the inherent difficulty and unfairness of processing hearing loss claims three different ways depending upon geography. A second reason is that the fallacy of the First Circuit's decision is easily identified.

The Director led the Court down the garden path from 33 U.S.C. §908(c)(23) to §910(d)(2) and then to §910(i) before urging that these "retiree" amendments are all inapplicable because 33 U.S.C. §910(i) applies only to diseases which do *not* immediately result in disability. The Court accepted the Director's representation that occupational loss of hearing does not worsen after the last exposure and so disability *does* result by retirement. The Court cited no evidence to support this medical conclusion and, instead, relied upon a learned treatise referenced by the Director plus the fact that "no one in this case disputes its accuracy" (App. 12).

No one disputed representations concerning a learned treatise not in the record for the simple reason that the representations are irrelevant. This is because the Board has consistently held that a retiree may be compensated for the *entirety* of his hearing loss, including progressive losses caused after retirement by aging or presbycusis. See, e.g., *Labbe v. Bath Iron Works and Commercial Union Insurance Companies*, 24 BRBS 159 (1991). It may be that the noise-induced portion of a hearing loss does not worsen, but the same cannot be said of the entire compensable loss of hearing. Thus, an individual such as Mr. Brown may retire in 1972, but not notice a loss of hearing until years later when his presbycusis worsens and he undergoes testing and receives an audiogram.⁴ Therefore, the time of injury for a retired hearing loss claimant can, and in this case did, occur well after retirement.

5. Reasoning of Fifth and Eleventh Circuits is Persuasive.

As noted, the Fifth Circuit disagreed with this approach in *Ingalls Shipbuilding v. Director, OWCP*, 898

⁴ Contrary to the First Circuit's assertion (App. 12), the Board did *not* concede that Mr. Brown's 84 [sic] percent deafness existed in 1972 at retirement. Instead, as noted by the ALJ, the 82.4 percent figure resulted from an audiogram performed on December 22, 1983 (App. 37). Too, the ALJ observed that this percentage resulted from loud noise as well as presbycusis. (App. 35).

F.2d 1088 (5th Cir. 1990). The Court specifically considered and *rejected* the Director's argument.

The Fifth Circuit observed that, prior to 1984, a retiree who sought compensation for an unscheduled ("system two") disease received nothing because he could not demonstrate a loss of wage earning capacity under 33 U.S.C. §908(c)(21). The Court viewed 33 U.S.C. §908(c)(23) as an *unambiguous* provision not subject to statutory construction. 898 F.2d at 1094. Further, it found no evidence that Congress did *not* intend to create a single scheme for all retirees rather than one scheme for retirees with hearing loss and one for retirees with other "long latency" diseases such as asbestosis. *Id.* On the contrary, the Fifth Circuit cited Senator Hatch's observation that, in two cases including one hearing loss case, the Board had denied compensation to workers whose diseases became manifest *after* retirement. 898 F.2d at 1093. Senator Hatch asserted that this "did not represent equitable policy" and that the Amendments made "express provision for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease". *Id.* The Court concluded that the Senator's reference to *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984), a hearing loss case, signalled Congress' intent to treat hearing loss like any other occupational disease. *Id.*⁵

⁵ The First Circuit chose to minimize the Senator's reference to *Redick* because (1) perhaps the Employee's symptoms became manifest *after* retirement contrary to the Court's newly formulated medical holding or (2) the holding in *Redick* was "simply wrong" (App. 15-16).

The Director's argument was also struck down by the Eleventh Circuit in *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561 (11th Cir. 1991). That Court held that, for purposes of fixing compensation in hearing loss cases, the time of injury occurs when the Employee becomes aware of the relationship between the employment and the disease. 933 F.2d at 1568. The Court concluded from the statute and its Legislative history that the reference to "occupational disease which does not immediately result in death or disability" in 33 U.S.C. §910(i) does *not* reflect a Congressional intent to treat hearing loss differently than other occupational diseases with respect to the time of injury. *Id.*

Thus, both the Fifth and Eleventh Circuits have specifically considered and *rejected* the very argument accepted by the First Circuit in this case. Those courts correctly relied upon the facts that the "retiree" amendments are unambiguous, that they apply "notwithstanding" 33 U.S.C. §908(c)(13), that Senator Hatch believed that a hearing loss case was one reason for the "retiree" amendments and that no legislative history suggests a different conclusion.

CONCLUSION

The First Circuit's holding is both flawed and in direct conflict with identical cases decided by the Fifth and Eleventh Circuits. BIW respectfully requests that a writ of certiorari issue to review the decision of the First Circuit and to resolve this conflict among the circuits.

Respectfully submitted,

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APPENDIX

App. 1

APPENDIX A

Decree of the First Circuit entered August 27, 1991

United States Court of Appeals
For the First Circuit

No. 91-1079

BATH IRON WORKS CORPORATION
AND COMMERCIAL UNION
INSURANCE COMPANIES,
Petitioners,

. v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,
Respondent.

PETITION FOR REVIEW OF AN ORDER
OF THE BENEFITS REVIEW BOARD

Before

Breyer, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Caffrey,* *Senior District Judge*.

*Of the District of Massachusetts, sitting by designation.

BREYER, *Circuit Judge*. This appeal concerns the calculation of Longshore and Harbor Workers' Compensation Act disability benefits due a retired riveter partially disabled due to deafness. The Act provides three different systems for compensating partially disabled workers. The first applies to those suffering scheduled (*i.e.*, particular, specifically listed) injuries. The second applies to those

suffering other (unscheduled) injuries. The third applies to workers who retire before becoming disabled. The Labor Department's Benefits Review Board awarded benefits to Mr. Brown, the riveter, calculated through use of both first and third systems. The petitioner, Brown's employer, Bath Iron Works, argues that the Board should have used the third system alone (which would have produced a smaller award). The respondent, the Director of the Labor Department's Office of Workers' Compensation, defends the Board's result, while arguing that the Board should have used the first system alone. We agree with the Director.

I.

Background

A.

The Three Systems

To help the reader understand the three different compensation calculation systems, we shall first describe them in a simplified way without using statutory language.

System One: Scheduled Injuries. The Act's schedule (in §§ 8(c)(1)-(20), 33 U.S.C. §§ 908(c)(1)-(20)) lists a number of specific injuries, such as loss of an arm or a leg or total or partial deafness, followed by a specific number of weeks (for example, loss of an arm, 312 weeks). The Act entitles a worker suffering one of the listed injuries to two-thirds of his average weekly wages for the listed number of weeks. Thus, for example, a worker earning \$600 per week (just over \$30,000 per year), who loses an

arm, would receive about \$400 per week (two-thirds of his average weekly wages) for 312 weeks, totalling about \$125,000, spread out over six years. See 33 U.S.C. § 908(c)(1). If that worker had become completely deaf, he would receive the \$400 per week (two-thirds of his average weekly wages) for 200 weeks, or about \$80,000, spread over about four years. See 33 U.S.C. § 908(c)(13)(B). The schedule provides for proportionate modification of the award for partial losses.

System Two: "Unscheduled" Injuries. The Act sets forth a different method for compensating other injuries not specifically listed in section 8(c)'s schedule. In such cases, § 8(c) (21), 33 U.S.C. § 908(c)(21), says that a worker will receive two-thirds of the *difference* between his average weekly wages and his residual (post-injury) earning capacity (as determined by the Labor Department) for as long as the disability continues. Thus, the same \$600 per week worker, who suffers, say, a slipped disk (not listed on the schedule) and who retains the capacity to earn only \$150 per week, would receive benefits of \$300 per week (two-thirds of the \$450 *difference*) for as long as the disability continues.

System Three: Injuries Suffered by Retired Workers. In 1984, Congress amended the Act to provide a special system of compensation for workers whose job-related injuries (or diseases such as asbestosis) did not become apparent until after retirement. See 33 U.S.C. §§ 902(10), 908(c) (23), 910(d)(2), 910(i). In such cases the Act begins with the principle that a disabled worker should receive two-thirds of his average weekly wages for as long as he is disabled, but it then modifies that principle in two important ways.

First, it multiplies the average weekly wage by a percentage, namely the percentage of total disability that the worker has suffered. It takes this percentage from American Medical Association tables. See 33 U.S.C. § 908(c)(23). Those tables say, for example, that a totally deaf person is 35% totally disabled. See *American Medical Association Guides to the Evaluation of Permanent Impairment* 170 (3d ed. 1988). If the deaf worker's average weekly wage is \$600, the worker would receive, not $\frac{2}{3}$ of his weekly wage (\$400), but \$400 multiplied by the percentage of total disability (35%), or \$140 per week for the duration of his disability. Because System Three multiplies the average weekly wage by this percentage-of-total-disability, it is often less generous than System One. Sometimes it could turn out to be more generous, however, for it makes its smaller payments, not just for a limited number of weeks, but indefinitely as long as the worker is disabled.

Second, System Three calculates "average weekly wages" in a special way. If the disability appears during the first year after retirement, that term simply means the wages the worker earned just before retirement. See 33 U.S.C. § 910(d)(2)(A). If the disability appears after the first year, however, that term means a national average weekly wages figure that the Department of Labor calculates. See 33 U.S.C. § 910(d)(2)(B). Depending upon what the worker actually made before retiring, this System Three definition results in awards that are sometimes less generous, but sometimes more generous, than awards under System One.

B.

The Statute's Structure

The key statutory language setting forth these three systems includes the following:

1. A *definitional* section defines "disability" (in relevant part) as

incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . .

33 U.S.C. § 902(10). It adds a special definition of "disability" as

permanent impairment, determined . . . under . . . American Medical Association [guidelines], in the case of an individual whose claim is described in section 910(d)(2) [i.e., System Three].

Id. The definitions also make clear that "injury" includes both job-related accidental injuries and occupational diseases. See 33 U.S.C. § 902(2).

2. *Key introductory, operative language, applicable to all three systems*, says

In case of disability partial in character but permanent in quality the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages . . . and shall be paid to the employee, as follows:

33 U.S.C. 908(c).

3. Immediately after this introductory language, the statute contains *twenty-three numbered subparagraphs*.

App. 6

a. Subparagraphs (1) - (20) and (22) contain the schedule, which we have called "System One." Subparagraph (13), for example, sets forth the number of weeks compensation for hearing loss. See 33 U.S.C. §§ 908(c)(1)-(20), (22).

b. Subparagraph (21) contains what we have called "System Two." It says

Other cases: In all other cases in the class of disability, the compensation shall be $66\frac{2}{3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter . . . payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21).

c. Subparagraph (23) contains the basic instruction for System Three. It says,

Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be $66\frac{2}{3}$ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the [AMA guidelines], payable during the continuance of such impairment.

33 U.S.C. § 908(c)(23).

4. As the last quoted sentence makes clear, *subparagraph (23)* (i.e., System Three) applies only "to a claim . . . for which the average weekly wages are determined under section 910(d)(2)." That subsection, 33 U.S.C. § 910(d)(2), and the definitional section referred to in that

App. 7

section, 33 U.S.C. § 910(i), set forth the System Three method for calculating "average weekly wages" that we have described above. See pp. 5 - 6, *supra*. More importantly for present purposes, that section says that its calculation method shall be used

with respect to any claim based on a . . . disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs

(A) within the first year after the employee has retired, . . . or

(B) more than one year after the employee has retired. . . .

33 U.S.C. § 910(d)(2). Subsection (i), which this subsection cross-references, defines "time of injury" for System Three purposes. It says,

For purposes of this section with respect to a claim for compensation for . . . disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee . . . becomes aware [or should have become aware] . . . of the relationship between the employment, the disease, and the . . . disability.

33 U.S.C. § 910(i).

All this quoted language seems complex. But, as we read it, it basically says something that is fairly simple: When the "time of injury" occurs before retirement, the Labor Department should calculate compensation under either System One (if the injury is scheduled) or System Two (if the injury is not scheduled). When the "time of

injury" occurs after retirement, the Labor Department should calculate compensation under System Three.

C.

The Need for System Three

Congress enacted the 1984 amendments creating System Three in response to a Benefits Review Board decision called *Aduddell v. Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. 131 (1984). In *Aduddell*, the Board considered a worker with asbestosis, who retired "prior to the manifestation of [the] . . . occupational disease." *Id.* at 133. The Board, pointing out that the "disease became manifest" long "after the claimant had retired," reasoned that its occurrence did not bring about a "loss of wage-earning capacity." *Id.* Hence, the "injury" (i.e., the disease) was not a "disability" as the Act defines that term. *Id.* Subsequently, the Board decided *Redick v. Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. 155 (1984), a case involving a worker's deafness that did not become "manifest" until after the worker had retired. It held, for similar reasons, that the Act did not authorize compensation. *See id.* at 157.

Congress enacted System Three in order to provide compensation that *Aduddell* denied. Congressional reports focused primarily upon "long-latency diseases" and Board cases that had considered asbestos-related diseases. *See* H.R. Conf. Rep. No. 1027, 98th Cong., 2nd Sess. 30 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 2771, 2780 (stating that the conferees specifically rejected the holdings of *Aduddell* and *Dunn v. Todd Shipyards*, 13 Ben. Rev. Bd. Serv. 647 (1981), both of which

involved asbestos-related diseases); H.R. Rep. No. 570, 98th Cong., 1st Sess. 10-12 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2743-45 (describing the amendments as concerning "long-latency occupational diseases," and specifically rejecting *Dunn*, which concerned an asbestos-related disease); *cf.* 130 Cong. Rec. H 9730 (daily ed. Sept. 18, 1984) (remarks of Rep. Miller) (stating that the amendments are intended to overrule *Dunn*, *Aduddell*, and *Worrell v. Newport News Shipbuilding and Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. 216 (1983), all of which involved asbestos-related diseases). Senator Hatch, a sponsor of the amendments, said that decisions such as *Aduddell* and *Redick* "did not represent equitable policy." 130 Cong. Rec. 26,300 (1984) (remarks of Sen. Hatch). He noted that the amendments made "express provisions for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease." *Id.* In essence, Congress seems to have read the Board's decisions as denying compensation to workers whose job-related injuries occurred after retirement, and it rewrote the statute to make certain those workers received compensation.

II.

The Legal Issue

The worker in this case, Ernest C. Brown, worked for Bath Iron Works almost continuously from 1939 until 1972, when he retired. In 1985 he received the results of a hearing test that showed he had lost 82.4% of his hearing while he was at work. He then asked for compensation (taking advantage of a special statutory provision that, in effect, tolls the time deadline for filing a claim based on

deafness until after the worker receives an audiogram). The Board, in awarding him compensation, said that, since he was a retired worker, he fell within the scope of System Three. But, it added that it would calculate compensation according to System One. The Board noted that, for a deaf person, System One's compensation ($\frac{2}{3}$ of average weekly wages for, say, 200 weeks) would likely prove far more generous than System Three compensation ($\frac{2}{3}$ average-weekly-wages times percent-of-total-disability (e.g., 35%) as long as the disability persists). It pointed out that a deaf worker who filed before retirement would automatically receive the former compensation. And, it could find no reason why Congress would want a deaf worker who did not file until after retirement to receive so much less. It referred to a Supreme Court case, *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980), which it took as holding that System One's schedule provides the proper compensation for anyone suffering a scheduled injury.

Bath Iron Works, Brown's employer, appeals the Board's decision, arguing that it makes no sense. Look at the words of the statute creating System Three, says Bath. Those words do not create any kind of "hybrid" system. Rather, they say specifically that, where System Three applies, the Board should calculate benefits as System Three commands, "notwithstanding paragraphs (1) through (22)," i.e. "notwithstanding" the statute's instructions for calculating System One and System Two benefits. See 33 U.S.C. § 908(c) (23). The Supreme Court case, *Potomac Electric*, adds Bath, has nothing to do with the matter. Rather, that case concerned a worker with a scheduled System One injury (permanent partial loss of the use of

his leg) who wanted to obtain (in his case, larger) unscheduled System Two benefits. The Supreme Court held that he could not do so, primarily because the introductory language applicable to both systems (indeed, to all three systems) says that the compensation "shall be" what the subsequent paragraphs provide. See *Potomac Electric*, 449 U.S. at 274. In other words, where those subsequent paragraphs provide a schedule, see 33 U.S.C. §§ 908(c) (1)-(20) & (22), the compensation shall be the scheduled amount; where the injury is unscheduled, see 33 U.S.C. § 908(c)(21), it shall be the unscheduled (subparagraph 21) amount. Bath might have added that, in fact, *Potomac Electric* supports Bath, not the Board, for the language "shall be" also applies to System Three's subparagraph (23). Thus, where subparagraph (23) applies, compensation shall be in the amount that it provides "notwithstanding paragraphs (1) through (22)." 33 U.S.C. § 908(c)(23).

The Fifth Circuit has accepted the very argument that Bath makes here. And, in a case identical to this one, it has ordered the Board to recalculate benefits under System Three, not System One rules. See *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 1091 (5th Cir. 1990). The Director of the Labor Department's Office of Workers' Compensation Programs urges us, however, to reach a different result. The Director argues that the Board has reached the correct result, but used the wrong reasoning to get there. We find the Director's argument convincing. We therefore must reach a conclusion different from that of the Fifth Circuit.

The Director's argument is a simple one. He agrees that System Three would apply in its entirety to a worker

who suffers an injury after retirement. And, he agrees that asbestosis is normally that kind of injury. But, deafness, he says, is not. Rather, deafness is an injury that a worker typically suffers *before* retirement. After retirement a worker's workplace-noise-induced deafness will not ordinarily grow worse; if anything it will get better. See R.T. Sataloff & J. Sataloff, *Occupational Hearing Loss* 357 (1987). Moreover, unlike asbestosis, the symptoms of deafness occur simultaneously with the "disease." In other words, to say that a worker is "84% deaf" is to say that he has lost 84% of his hearing. If he does not notice his deafness, and does not file a claim until long after retirement, that fact does not mean he is not deaf; it does not mean he has no deafness symptom; rather, it means he may have grown accustomed to his deafness, which is quite a different matter.

We accept the Director's description of deafness as accurate for two reasons. First, the Director supports that description with citations to appropriate scientific treatises. Second, no one in this case disputes its accuracy. Indeed, the Board itself concedes that Brown became 84% deaf in 1972, at the workplace. It does not say that Brown had a disease that *only later*, after retirement, caused him to lose his hearing.

Once we accept the Director's (and the Board's) description of the characteristics of deafness, the law seems to us to mandate compensation according to System One. The language applicable to System Three makes clear that that System does not apply at all. As we have pointed out above, System Three's subparagraph (23) says that it applies only in cases where average weekly wages are compensated under "section 910(d)(2)." 33

U.S.C. § 908(c)(23). Similarly, the special part of the statute's "disability" definition that refers to the AMA guidelines applies only to "an individual whose claim is described in section 910(d)(2)." 33 U.S.C. § 902(10). Section 910(d)(2) says that it applies only where the "disability . . . occurs . . . within the first year *after the employee has retired* . . . or . . . more than one year *after the employee has retired*" 33 U.S.C. § 910(d)(2). Using ordinary English, however, one would normally say that a worker who becomes deaf before retirement is a worker whose disability "occurs" *before* retirement, not *after* retirement. Hence, the language of section 910(d)(2) seems not to apply to a worker who becomes deaf at the workplace.

The same section, section 910(d)(2), reinforces the same point by making clear that it applies only where there is a "*time of injury (as determined under subsection (i)).*" 33 U.S.C. § 910(d)(2). Subsection (i) calculates a special post-retirement time of injury "with respect to a claim for compensation for . . . disability due to an occupational disease which does not immediately result in . . . disability." 33 U.S.C. § 910(i). Again, using ordinary English, one would normally say that deafness is a disease that causes its symptoms, namely loss of hearing, simultaneously with its occurrence. One simply cannot say that a person suffering from deafness is not deaf – whether or not he notices how deaf he is.

Just as the statute's language suggests that the worker who becomes deaf just before retirement falls outside the scope of System Three, it suggests that he falls within the scope of System One. The statute says that if he suffers a "disability," 33 U.S.C. § 908(c), called "loss of hearing," 33 U.S.C. § 908(c)(13), he "shall be

paid," 33 U.S.C. § 908(c), System One's scheduled (§ 908(c)(13)) amount. He suffers a "disability" if he had an "incapacity because of injury to earn the wages" which he was "receiving at the time of injury." 33 U.S.C. § 902(10). Again, given the Director's undisputed account of how deafness occurs, one would ordinarily say that the "time of injury" in the case of a worker who goes deaf on the job is the time he loses his hearing, even if he did not notice that loss until later. Hence, such a worker would be entitled to System One compensation.

We recognize four arguments, however, that tend to support Bath, or the Board. First, in *Redick v. Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. 155 (1984), the Board came to a different conclusion. There it held that a deaf worker who voluntarily retires "prior to the manifestation of his disability" is not entitled to System One compensation. *See id.* at 157. It adopted the same reasoning it had used in *Aduddell* in respect to asbestosis, namely that the injury to such a worker does not create (in the words of the statute's "disability" definition) an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." *See id.* Since he was retired anyway, the Board said, the deafness did not cause a loss of wage-earning capacity. Extending this reasoning, a deaf worker such as Brown who did not become aware of his disability nor file his disability benefit claim until after he voluntarily retired, would not fall within Systems One or Two (for his injury would not satisfy the normal "disability" definition), and if he did not fall within System Three, he would not fall within any system at all.

We do not believe, however, that *Redick* leads to such a result. If we assume that the *Redick* Board used the word "manifest" to refer to the appearance of disabling symptoms, then the present case is distinguishable. If *Redick* used "manifestation" in such a way, then it must either have (1) made what it would now apparently concede were incorrect assumptions about the nature of normal hearing loss (namely, it must have assumed that workplace incidents often cause no immediate hearing loss, but lead to delayed hearing loss), or (2) believed that it was dealing with a special case in which a pre-retirement disease did not cause hearing loss prior to retirement, but caused such loss after retirement. Under either of these factual assumptions, the claim in *Redick* would now (after the 1984 amendments) be treated under System Three, because the disability in question would fall within the scope of § 910(i)'s category of a "disability due to an occupational disease which does not immediately result in . . . disability," and therefore the "time of injury" (under § 910(i), the time of awareness "of the relationship between the employment, the disease, and the death or disability") would be after the employee had retired. By contrast, in this case, we assume that Brown's disabling symptoms appeared simultaneously with his disease – deafness – over the course of his employment. Thus, Brown's injury "manifested" itself prior to retirement; and therefore the *Redick* holding does not fit this case, nor does this case fall within System Three.

If we assume that *Redick* used "manifest" to refer, not to the appearance of disabling symptoms, but to the point at which the claimant notices those symptoms – in other words, if the *Redick* Board believed that the hearing loss

occurred before retirement, but the claimant did not notice the hearing loss until after retirement – then we believe that the holding in *Redick* was simply wrong. A person who loses his ability to hear even just before he retires, like a person who loses an arm just before he retires, is a person about whom one often can reasonably say, “he has an ‘incapacity because of injury to earn the wages’ that he was ‘receiving at the time of injury.’ ” 33 U.S.C. § 902(10). For one thing, the word “incapacity” does not mean a failure, in fact, to earn prior wages; it means an *inability* to earn prior wages. A physically fit retired worker is likely to be *able* to earn prior wages (though he likely chooses not to do so); a retired worker without an arm or without hearing is, comparatively speaking, often less likely to be *able* to earn prior wages even should he choose to try to do so. For another thing, and more importantly, the statute *presumes* that a worker who suffers a scheduled injury suffers an “incapacity because of injury to earn” prior wages. Such has long been the law. The Second Circuit, more than thirty-five years ago, wrote that

in the case of schedule losses, the Congress has determined that a loss of wage-earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment.

Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 144 (2d Cir. 1955). And, the Supreme Court, more recently describing System One, said,

the injured employee is entitled to receive two-thirds of his average weekly wages for a specific

number of weeks, regardless of whether his earning capacity has actually been impaired.

Potomac Electric, 449 U.S. at 269. This law is understandable, for without it (and under the Board’s *Redick* reasoning), a worker, who, say, suffered a bad accident the day before his retirement, and who awoke from a coma a week later (after retirement) to find he had lost an arm, would receive no scheduled compensation.

Second, the Board points out that Senator Hatch, a sponsor of the 1984 “System Three” amendments, listed *Redick* as one of several cases that he believed “did not represent equitable policy.” 130 Cong. Rec. 26,300 (1984) (remarks of Sen. Hatch). It concludes from this that the System Three amendments, designed to overcome the inequitable results, must have included hearing loss cases. This argument, however, seeks to prove far too much on the basis of far too little. For one thing, the Senator may well have read *Redick* as involving hearing loss that did not *occur* until after retirement, in which event, it would resemble asbestosis and fall within System Three. For another thing, the Senator need not have cared about the precise rationale of *Redick*, for, insofar as it dealt with typical hearing loss occurring prior to retirement, it could be corrected judicially and did not necessarily require special legislation. Finally, the legislative debates primarily concerned “long-latency diseases,” such as asbestosis, not hearing loss, and there is no good reason for thinking that Senator Hatch, in his effort to correct unfairness, did want, or would have wanted, the law to treat “hearing loss” cases less generously than it would have done without the amendments.

Third, the Fifth Circuit, in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990), has held that the Board correctly placed hearing loss cases within System Three (though it then incorrectly hybridized System Three by bringing in System One's schedule to calculate the payment). In particular, the Fifth Circuit so held while agreeing that "differences may exist between the progression of asbestosis versus hearing loss." *Id.* at 1093. It agreed that asbestosis (as described in *Aduddell*) is a disease with symptoms that often do not appear until after retirement, while in hearing loss cases "the full extent of the . . . injur[y] is set on the day" the worker "leaves the workplace." *Id.* But, it added that the "fact that hearing loss does not progress after retirement does not compel a different compensation scheme absent a showing that Congress intended one." *Id.* at 1093-94. And, it could find no reason for thinking that Congress did intend a different scheme.

We have found such a reason, however, for thinking that Congress did intend a different scheme, in the plain language of the statute. The statute, while complex with operative language placed in different sections, is not ambiguous or unclear once its different parts are unscrambled. For the reasons we have already stated, we conclude that its language treats a hearing loss case differently than an asbestosis case for the very reason that the Fifth Circuit found irrelevant. Because the hearing loss symptoms are irrevocably fixed before retirement, while the asbestosis symptoms may not appear until after retirement, the "time of injury" in the first case, but not the second case, is prior to retirement. Therefore, System Three's operative language (in 33 U.S.C. §§ 910(d)(2) &

910(i)) does not apply, while the ordinary System One and System Two definitions and operative language do apply.

Fourth, the Board, and the Fifth Circuit, refer to cases that define "time of injury" as the time when a disease "manifests" itself rather than the time when the worker suffers his last, disease-causing, exposure. See *Castorina v. Lykes Brothers Steamship Co., Inc.*, 758 F.2d 1025, 1031 (5th Cir.), cert. denied, 474 U.S. 846 (1985); *Todd Shipbuilding Corp. v. Black*, 717 F.2d 1280, 1289-91 (1983), cert. denied, 466 U.S. 937 (1984). These cases, however, are beside the point here, for they concern asbestosis, a disease in which the disabling symptoms occurred after retirement. In so far as the courts and Board used the word "manifest" to refer to the appearance of disabling symptoms, these decisions make sense, but they seem inapplicable here, where hearing loss is fixed forever before retirement.

In sum, the Director's interpretation is consistent with the ordinary meaning of the statute's language and with its structure; and, it permits the System One compensation calculations that the Board believed necessary to avoid unfairness. The arguments for a different reading are not very convincing. We therefore accept the interpretation of the statute for which the Director argues.

We must mention one final point. The Director points out that, although the Board said it was awarding System One compensation in this case, in fact it did not properly perform the System One calculation. System One requires the calculator to use the "average weekly wages" as of the time of disablement (in this case, 1972). See 33 U.S.C.

§ 910. Instead, the Board used a System Three figure, namely the national average weekly wages as of the time of filing the claim (a 1985 figure). The Director, however, has not asked the Board, nor this Court, to recalculate the award, but, rather, has asked us to affirm it. Bath, while disagreeing with the Board's use of System One's calculation method, nowhere complains of the calculation having been made improperly. The claimant obviously does not want a recalculation (which would produce a lower award). And, the matter has no significance beyond this case. We therefore consider the issue waived.

The Board's award is

Affirmed.

APPENDIX B

Decision and Order *En Banc* of the Benefits Review Board
Filed November 26, 1990

BRB No. 88-3873

ERNEST C. BROWN)	
Claimant-Respondent)	
v.)	
BATH IRON WORKS)	(Filed
CORPORATION)	Nov. 26, 1990)
and)	
COMMERCIAL UNION)	
INSURANCE COMPANY)	
Employer/Carrier-)	
Petitioners)	
DIRECTOR, OFFICE OF)	
WORKERS' COMPENSATION)	
PROGRAMS, UNITED STATES)	
DEPARTMENT OF LABOR)	DECISION and
Respondent)	ORDER <i>EN BANC</i>

Appeal of the Decision and Order of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, and SMITH, BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order (88-LHC-145) of Administrative Law Judge Martin J. Dolan Jr. awarding benefits on a claim filed pursuant to the

provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings and conclusions of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was exposed to loud noise while working for employer as a riveter passer, a riveter, and a chipper from 1939 to 1947 and from 1950 until he retired in 1972. On December 29, 1954, claimant underwent an audiogram which revealed a 40.6 percent binaural hearing loss, but claimant never received the results of this audiogram. On March 15, 1977, an audiogram revealed that claimant had a moderate to severe sensorineural hearing loss in the left ear and a severe to profound sensorineural hearing loss in the right ear. Although claimant underwent several audiograms in the next several years, he did not receive copies of the results of these audiograms until he requested them on September 6, 1985. Claimant filed this claim on September 20, 1985, requesting permanent disability benefits for his hearing loss.

The administrative law judge determined that claimant's notice and claim were timely filed, that his hearing loss constitutes an occupational disease, and that claimant suffered a permanent 82.4 percent binaural hearing loss caused by his employment. The administrative law judge further determined that the voluntary retiree provisions, 33 U.S.C. §§902(10), 910(d)(2) (Supp. V 1987), are applicable and that because the time of injury, *see* 33 U.S.C. §910(i) (Supp. V 1987), September 6, 1985, occurred more than one year subsequent to claimant's retirement,

the applicable average weekly wage under Section 10(d)(2)(B) is \$289.83. Notwithstanding claimant's voluntary retiree status, the administrative law judge, relying on *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988), concluded that claimant's hearing loss benefits must be calculated pursuant to 33 U.S.C. §908(c)(13) (Supp. V 1987), rather than 33 U.S.C. §908(c)(23), and awarded claimant compensation for a 82.4 percent binaural hearing loss under Section 8(c)(13). The administrative law judge also awarded employer relief pursuant to 33 U.S.C. §908(f) (Supp. V 1987).

On appeal, employer argues that the administrative law judge erred in failing to calculate claimant's hearing loss benefits pursuant to Section 8(c)(23). Employer avers that the retiree provisions were enacted to provide a limited benefit based on impairment of the whole person and that if Congress had intended retirees to obtain scheduled awards on the same basis as non-retirees, Congress would not have provided that Section 8(c)(23) was applicable notwithstanding Section 8(c)(1)-(22).¹ Claimant responds urging affirmance of the administrative law judge's Decision. Director responds that the administrative law judge erred in determining claimant's time of injury pursuant to Section 10(i) because although hearing loss is an occupational disease, it is one which immediately results in disability.

¹ Employer avers that claimant's 82.4 percent binaural hearing loss translates into a 29 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (2d ed. 1984).

The contentions of the employer and the Director have previously been considered and rejected in *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) (*en banc*), in which the Board held that benefits for a claimant who retires for reasons unrelated to his hearing loss are to be calculated pursuant to Section 8(c)(13) and that the time of injury for purposes of calculating claimant's average weekly wage in a hearing loss claim is determined pursuant to Section 10(i) as amended in 1984. We note that the United States Court of Appeals for the Fifth Circuit held in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in part & aff'g in part sub nom. Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), & *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989), that because on its face, Section 8(c)(23) states that it is to be applied notwithstanding Section 8(c)(1)-(22), the Board erred in *Machado* in holding that hearing loss benefits for a voluntary retiree should be calculated pursuant to Section 8(c)(13). The Fifth Circuit, however, affirmed the Board's determination that amended Section 10(i) applies to hearing loss claims.

Initially, we reject the Director's Section 10(i) argument for the reasons expressed by the Board in *Machado*, *supra*, and by the Fifth Circuit in rejecting the Director's assertion that amended Section 10(i) is inapplicable in hearing loss cases in *Ingalls Shipbuilding*, 898 F.2d at 1092-94, 23 BRBS at 65-66 (CRT).²

² The court also rejected claimants' assertions that even if Section 8(c)(23) is applicable, the relevant percentage used to calculate benefits should be the loss to hearing rather than the

(Continued on following page)

Regarding the issue of application of Section 8(c)(23), we continue to believe that a result different from that in *Ingalls Shipbuilding* may be reached in hearing loss cases based on our construction of Section 8 of the Act.³ In *Machado*, the Board concluded that Congress did not intend to apply this provision in hearing loss cases. The Board relied on the decision of the United States Supreme Court in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980), that the schedule is the exclusive remedy for permanent partial disability of the parts of the body listed therein, noting that, unlike other occupational diseases, a scheduled remedy is provided for loss of hearing

(Continued from previous page)

loss to the whole person, noting that 33 U.S.C. §902(10) (Supp. V 1987) states that when a claim comes under Section 10(d)(2), disability means permanent impairment determined under the American Medical Association *Guides to the Evaluation of Permanent Impairment* which espouse the philosophy that an impairment affects the whole person and thus disability must be expressed as a percentage of the whole person.

³ Section 8(c)(23) was enacted in 1984 as part of a group of amendments intended to overturn the Board's decisions in *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 347 (1984), and *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984). In *Aduddell*, the Board held that a claimant who was a voluntary retiree at the time his occupational disease became manifest could not be compensated under the Act because he had no loss in wage-earning capacity. In *Redick*, this holding was extended to a hearing loss case, even though an actual loss in wage earning capacity need not be shown in order for claimant to recover under the schedule. The 1984 Amendments altered the definition of disability under the Act, extending it to include permanent impairment as defined by guidelines published by the American Medical Association for a specific class of claimants, voluntary retirees.

based on permanent impairment. Moreover, while all other occupational diseases could be compensated prior to the 1984 Amendments only if a loss in wage-earning capacity were shown under Section 8(c)(21), see *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 347 (1984), hearing loss was compensated based on permanent impairment ratings prior to enactment of the amendments. In *Machado*, the Board noted that if Section 8(c)(23) were applied, it would effectively reduce the benefits paid to retirees for hearing loss since under that section, a measured hearing impairment must be converted to an impairment of the whole person. Under Section 8(c)(13), an employee's rated hearing loss is compensated based on the percentage of the loss for a limited period of weeks. The Board stated that compensating hearing loss under Section 8(c)(23) would result in disparate treatment between retired employees and others filing claims for hearing loss and that converting a scheduled payment to continuing weekly payments would not foster administrative efficiency. Although the Board recognized that Section 8(c)(23) sets forth a means of calculating benefits "notwithstanding paragraphs (1) through (22)" of Section 8(c), the Board held in *Machado* that given the above considerations, Congress could not have intended that it apply in hearing loss cases.

In *Machado*, the Board construed Section 8 in a manner consistent with the intent of Congress, the principle that the Act should be construed in a manner avoiding harsh and incongruous results and the beneficent purposes of the Act. We believe that the construction of the statute adopted in *Machado* best accomplishes these goals. Because this case arises in the First Circuit, which has not

addressed these issues, the arguments of employer are rejected for the reasons set forth in *Machado*. We therefore affirm the administrative law judge's award of permanent partial disability benefits for claimant's hearing loss pursuant to Section 8(c)(13).

Accordingly, the administrative law judge's Decision and Order awarding hearing loss benefits is affirmed.

SO ORDERED.

/s/ R P Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S. Dolder
I concur: NANCY S. DOLDER
Administrative Appeals Judge

Dated this 26th day of
November 1990

STAGE, Chief Administrative Appeals Judge, concurring in result only:

I concur in the majority's determination that employer is entitled to Section 8(f) relief. I disagree, however, with *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) (*en banc*), upon which the majority bases its opinion and instead agree with the conclusion of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in part & aff'g in part sub nom. Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), & *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS

262 (1989), that *Machado* fails to provide a reasoned basis for not applying the plain language of Section 8(c)(23) to hearing loss claims by voluntary retirees. Nonetheless, I concur in the majority's affirmance of the administrative law judge's award of benefits for claimant's hearing loss pursuant to Section 8(c)(13) because this case arises in the First Circuit, which has yet to address whether 33 U.S.C. §908(c)(23) (Supp. V 1987) is applicable to a hearing loss claim by a voluntary retiree. I believe that the Board should continue to apply its own precedent until another United States circuit court of appeals speaks on this issue.

/s/ Betty J. Stage
 BETTY J. STAGE, Chief
 Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues that hearing loss benefits for voluntary retirees are to be calculated pursuant to Section 8(c)(13), I disagree with the administrative law judge's determination that employer is entitled to Section 8(f) relief for the reasons espoused in my dissenting opinions in *Fucci v. General Dynamics Corp.*, 23 BRBS 161, 166-69 (1990), and *Balzer v. General Dynamics Corp.*, 23 BRBS 241, 244-46 (1990) (*en banc*), *aff'g on recon.* 22 BRBS 447 (1989). In my opinion, full liability for claimant's entire 32.4 percent binaural hearing loss rests with

employer under *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955).

/s/ James F. Brown
 JAMES F. BROWN
 Administrative Appeals Judge

McGRANERY, J., Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision that employer is entitled to Section 8(f) relief. I dissent, however, in their determination that Section 8(c)(13) rather than Section 8(c)(23) governs awards of hearing loss for voluntary retirees. Essentially, the majority determined that congress could not have intended for voluntary retirees to receive awards pursuant to Section 8(c)(23) for hearing loss due to occupational disease, because the small weekly payment, compared with a lump sum award pursuant to Section 8(c)(13), is both insignificant to claimants and administratively inefficient for employers. The United States Court of Appeals for the Fifth Circuit rejected this argument in *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). The court held that the Board was not free to ignore the language of Section 8(c)(23) which "[o]n its face . . . applies to retirees 'notwithstanding [§908(c)] paragraphs (1) through 22.'" *Id.* at 1090, 23 BRBS at 63 (CRT). Moreover, the court reviewed the legislative history of the 1984 Amendments and concluded that the "excerpts of the congressional Record indicate that retirees with hearing losses should be treated the same as all other retirees." *Id.* at 1092, 23 BRBS at 65 (CRT). In view of the lack of

substantial legal authority for the Board's decision and the clear holding of the Fifth Circuit in *Ingalls*, resting on the words of the statute and the legislative history, I think that the time has come for the Board to reverse its position taken in *Machado* and to hold that Section 8(c)(23) governs the awards to voluntary retirees who suffer hearing loss due to occupational disease.

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX C

Decision and Order of the Administrative Law Judge
dated October 3, 1988

U.S. Department of Labor

Office of Administrative
Law Judges
John W. McCormack Post
Office
and Courthouse
Room 409
Boston, Massachusetts
02109

In the matter of: *
Ernest C. Brown *
Claimant * Case No.
against * 88-LHC-145
Bath Iron Works *
Employer * OWCP No.
and * 1-85467
Commercial Union *
Insurance Co. *
Carrier *

Appearances:

Ronald W. Lupton, Esq.
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280 Front Street
Bath, Maine 04530
For the Claimant

Kevin Gillis, Esq.
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P.O. Box 15340
Portland, Maine 04101

For Commercial Union Insurance Co.

Before: MARTIN J. DOLAN, JR.
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.*, herein referred to as the Act, filed by Ernest C. Brown, (hereinafter referred to as the Claimant), against Bath Iron Works Corporation (hereinafter referred to as Respondent) and Commercial Union Insurance Company. A hearing was held on February 10, 1988 in Portland, Maine at which time all parties were given the opportunity to present evidence and oral arguments.

Documentary evidence was submitted by the Claimant on a post-hearing basis in the form of a deposition of Dr. Peter Haughwout dated March 31, 1988; this document is admitted into evidence as Claimant's exhibit 20. The Employer and Carrier submitted on a post-hearing basis documentation in the form of a deposition of Dr. Robert Dixon dated March 18, 1988 and a deposition of Dr. David Hill dated March 28, 1988; these documents are admitted into evidence as Employer's exhibits 7 and 8 respectively. This Decision and Order is rendered based upon an evaluation of the entire record.

At the hearing, the parties agreed on the following material facts: that an employee/employer relationship

existed at all relevant times and that there is jurisdiction under the Act.

The case involves a claim for a binaural hearing loss and the issues are: 1) whether notice and claim were timely filed; 2) the nature and extent of the Claimant's hearing loss; 3) the causal relationship between employment and the hearing loss; 4) the average weekly wage and amount of compensation due to the Claimant; 5) whether the Claimant is entitled to medical benefits under Section 7; and 6) whether Section 8(f) is applicable.

Findings of Fact and Conclusions of Law

Claimant, age 68, began working for Bath Iron Works Corporation in 1939. Prior to that time, he had worked in a filling station and had no exposure to loud noise. Claimant had worked at Bath Iron Works from 1939 to 1947, first as a rivet passer on a riveting gang and then as a riveter. In 1947 he was laid off, returning to work for Employer in 1950 as a riveter and chipper continuing in this capacity until his retirement in 1972. Claimant testified that during the course of his work at Employer's shipyard he was exposed to loud noise not only from his activities, but also from noise generated from his co-workers. When questioned about the wearing of hearing protection, Claimant testified that he did not utilize any hearing protection during his employment at Bath Iron Works.

Claimant was administered an audiogram at the Bath Iron Works shipyard on December 29, 1954. The audiogram reflecting the results of that test has been submitted into evidence as Employer's exhibit 4; according to this

audiogram, the Claimant had experienced a permanent hearing loss at that time.

Subsequent to his retirement, Claimant saw his family physician, Dr. David Hill, in March 1976, who then referred him to Dr. Robert Dixon for a problem with nasal polyps. Dr. Dixon, an ear, nose, and throat specialist, removed the polyps from Claimant's nose and referred Claimant to the Pine Tree Society for audiological testing. Dr. Dixon testified that he concluded, on the basis of Claimant's work history, that Claimant had a noise induced hearing loss, but Dr. Dixon did not recall nor did his records indicate that he discussed this with the Claimant. The Claimant was tested on March 15, 1977 by Deborah Berman, a certified audiologist. Ms. Berman opined that the pure tone test results indicated "a moderate to severe sensorineural hearing loss in the left ear and a severe to profound sensorineural hearing loss in the right ear." (CX 13). She also opined that a hearing loss of this degree would interfere with normal conversation and indicated that the Claimant would be an excellent hearing aid candidate. The Claimant testified that the audiologist showed him the test results, but he did not recall discussing with her the cause of his hearing loss. Deborah Berman forwarded a copy of the March 15, 1977 report to Dr. Dixon; however, there is no evidence that Claimant was provided with a copy of the audiogram until September 6, 1985.

Claimant underwent further examination at Pine Tree Society's facility on April 17, 1978, December 22, 1983, and August 11, 1986. The December 22, 1983 audiogram in evidence satisfies the criteria of Section 8(c)(13)(C) and was the last audiogram performed prior to Claimant's

filing of his claim on September 20, 1985. It was administered by Deborah Berman and was forwarded to the Claimant on September 6, 1985. This audiogram revealed a binaural hearing loss of 82.4% pursuant to the AMA formula. Deborah Berman administered another audiogram on August 11, 1986 and opined that the pure tone thresholds had not changed significantly since Claimant's previous evaluation of December 22, 1983.

Dr. Peter Haughwout, a specialist in otolaryngology, examined the Claimant on September 24, 1985 and April 17, 1987. Based upon his review of audiograms dating back to 1954 and his examination of the Claimant, Dr. Haughwout commented in his report that Claimant had a sensorineural hearing loss in both ears consistent with job-related noise exposure at Bath Iron Works. Dr. Haughwout re-examined Claimant on April 17, 1987 to determine the cause of his hearing loss. He stated in his report that it would be appropriate to obtain further studies, however, he still agreed with his previous finding that Claimant's hearing loss was caused, in part, by noise exposure in his work place. Dr. Haughwout further testified by deposition on March 31, 1988 and attributed the principal cause of Claimant's hearing loss to exposure to loud noise at Bath Iron Works as well as to such secondary causes as presbycusis and possibly some other factor.

Dr. Joseph Sataloff, a specialist in otology, reviewed the Claimant's medical records and issued a report dated October 22, 1986. Dr. Sataloff opined that none of Claimant's hearing loss was caused by noise exposure in hi [sic] job. He further opined that Claimant's hearing loss is too

severe to have been caused by occupational noise exposure and that his hearing loss is inconsistent with occupationally induced hearing loss.

Section 13(b), as amended in 1984, requires that a claim for death or disability due to an occupational disease which does not immediately result in disability or death must be filed within two years after the employee or Claimant becomes aware, or in the exercise of reasonable diligence, or by reason of medical advice should have been aware of the relationship between the employment, the disease, and the death or disability, or within one year from the date of the last payment of compensation, whichever is later. In the case of a claim for hearing loss, the Benefits Review Board has held that the Section 13 statute of limitations does not begin to run until the employee has received an audiogram, with the accompanying report thereon, indicating a hearing loss and is aware of the relationship between such hearing loss and his employment. *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986).

It is clear from the facts of record that the time limitation provisions of Sections 12 and 13 of the Act, as amended in 1984 with the inclusion of Section 8(c)(13)(D), have been met, and that this claim is not time barred by either. While the record evidence does show audiograms conducted by Bath Iron Works and Pine Tree Society as early as 1954, there is no evidence indicating that Claimant received copies of any of these audiograms. Claimant filed a claim for benefits under the Act on September 20, 1985. The record evidence indicates that Claimant was not furnished a copy of any of the audiograms administered by Pine Tree Society until September 6, 1985 when

he requested said copies. Although Claimant may have suspected a causal relationship between his hearing loss and his employment, the time for notice and filing did not occur until he received a copy of an audiogram. This element was not satisfied until September 6, 1985 when the Claimant obtained copies of all of the audiograms previously performed at the Pine Tree Society. Thus, the notice and filing periods began to run on September 6, 1985 and Claimant having filed his claim subsequent thereto on September 20, 1985, clearly the requirements of Sections 12 and 13 have been timely fulfilled.

As to the degree of Claimant's hearing loss, the 1984 Amendments to the Act require that such determination be made under the AMA guides for the evaluation of permanent hearing impairments. As noted hereinbefore, Claimant was examined at Pine Tree Society on December 22, 1983 at which time the audiogram performed by a certified audiologist reflected an 82.4% binaural hearing loss according to the AMA guidelines. There is no evidence of a contrary audiogram made at that time, and furthermore the August 11, 1986 audiogram, according to Deborah Berman who administered the test, showed no significant change since Claimant's previous evaluation on December 22, 1983. I therefore find that Claimant has a permanent partial 82.4% binaural hearing loss. Notwithstanding the fact that the Claimant is a retiree within meaning of Section 8(c)(23) and Section 10(d)(2) of the Act as amended in 1984, I determine that the calculation of Claimant's compensation must be made pursuant to a scheduled award under Section 8(c)(13) of the Act rather than pursuant to Section 8(c)(23) of the amended Act, this by virtue of the dictate of the recent decision of the

Benefits Review Board in *MacLeod v. Bethlehem Steel Corporation*, 20 BRBS 234 (1988). In *MacLeod*, the Board concluded that while hearing loss resulting from prolonged on-the-job exposure to noise constitutes an occupational disease within the meaning of the Act, the amount of compensation for hearing loss, a permanent partial disability is specified as a scheduled injury in Section 8(c)(13), which should and does control the nature of the award.

Once an injury has been shown, there is a presumption that the injury arose out of and in the course of Claimant's employment. See Section 20(a) of the Act and *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir.) cert. denied, 429 U.S. 820 (1976). Aside from the presumption, the evidence supports the assertion that the Claimant has been exposed to injurious noise stimuli while employed at Bath Iron Works from 1939 through 1972 in the form of noise produced by himself and co-workers. Specifically, I credit the testimony of the Claimant, along with the deposition testimony of Dr. Haughwout and Dr. Dixon, as to the nature and severity of the noise exposure the Claimant had experienced at Bath Iron Works. Both Dr. Haughwout and Dr. Dixon opined that the Claimant's long history of noise exposure at Bath Iron Works had contributed, in part, to the Claimant's hearing loss. It is specifically noted that the fact that only a proportion of the Claimant's hearing loss is attributable to his noise exposure while working for the Employer does not affect the liability of the Employer in this occupational disease case involving a hearing loss inasmuch as the Benefits Review Board has held that an employee must be compensated for the full extent of his binaural

hearing loss even though a proportion of the hearing loss was not employment related. *Worthington v. Newport News*, 18 BRBS 200 (1986). While I am impressed with Dr. Sataloff's professional qualifications, I am persuaded to give special deference to the opinions of Dr. Haughwout and Dr. Dixon insofar as they both personally examined Claimant as well as reviewing his medical records and audiograms. Additionally, it is noted that Dr. Haughwout and Dr. Dixon both testified via deposition that Claimant had a work-related binaural hearing loss, thus allowing all adverse parties the opportunity to examine both of these witnesses. Accordingly, based on the Section 20(a) presumption and a preponderance of the record evidence, I find that Claimant was exposed to deleterious noise levels while employed by Bath Iron Works and that his hearing loss resulted, in part, from such acoustic trauma experienced while so employed at the Bath Iron Works shipyard and thus his hearing loss arose out of and in the course of his employment in Bath Iron Works.

It is noted that the Claimant is a retired employee and was such at the time that his claim for benefits was filed on September 20, 1985. I find that the occupational disease provisions of the Act, as amended in 1984, are applicable to hearing loss claims, and that Claimant is entitled to compensation for his hearing loss even though it manifested itself after his retirement from the Bath Iron Works shipyard in 1972. Noise-induced hearing loss has consistently been treated as an occupational disease. (See, e.g., *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.) cert. denied, 350 U.S. 913 (1955); *Whitlock v. Lockheed Shipbuilding and Construction Co.*, 12 BRBS 91 (1980); *Tisdale v. Owen-Corning Fiber Glass Co.*, 13 BRBS 167 (1981);

Verderane v. Jacksonville Shipyards, 14 BRBS 220.15 (1982)). Accordingly, I find that this Claimant is entitled to permanent partial disability compensation for his work-related hearing loss commencing on September 6, 1985.

Section 10(d)(2)(B) of the Act, as amended in 1984, provides that in cases of permanent partial disability due to occupational disease where the "time of injury" occurs more than one year after the employee has retired, "the average weekly wage shall be deemed to be the national average weekly wage "as determined by the Secretary pursuant to Section 6(b) applicable at the time of injury". The record indicates, as stated above, that the "time of injury" was September 6, 1985, the date Claimant first received an audiogram and was then made aware of the connection between his hearing loss and his employment. Claimant retired on June 30, 1972. Therefore, Section 10(d)(2)(B) requires that his average weekly wage be considered as \$289.83, the national average weekly wage in existence on September 6, 1985.

The application of Section 8(f) is also an issue in this case. The burden of proof is on the employer to show all the facts necessary for 8(f) relief. *Bullock v. Sunshipbuilding & Dry Dock Co.*, 13 BRBS 380, 382 (1981).

Special Fund relief under section 8(f) is available to an employer who hires or retains an employee in its employment when three conditions are met: (1) the Employee has an existing permanent partial disability, which (2) is manifest in the sense of being determinable by a professional diagnostician in the field, and (3) the existing permanent partial disability combines with a

subsequent work-related injury or aggravation to produce a greater degree of permanent partial or even permanent total disability. The requirement that the existing permanent partial disability be manifest to the Employer has been construed not to require actual knowledge on the part of the Employer. Rather, a wide variety of situations will suffice to satisfy the "manifest disability" requirement. See, e.g., *OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452 (3d Cir. 1978).

Notwithstanding the fact that Section 8(f) applicability was not put forth as an issue by the Respondent either in its pre-hearing statement or during the course of the hearing held on February 10, 1988, medical evidence developed via deposition on a post-hearing basis disclosed for the first time that the Claimant was afflicted with a pre-existing impairment in the form of a mixed hearing loss attributed, in part, to occupational noise exposure while another portion of the hearing loss was related to other factors. It is further noted that Respondents reserved the right to raise the Section 8(f) issue on a post-hearing basis in the event that such medical information became available after the hearing indicating that Section 8(f) is applicable. I thus determine that these circumstances warrant my consideration of the Section 8(f) issue at this time. *Mason v. Bender Welding and Machine Co.*, 16 BRBS 307 (1984).

There is evidence which demonstrates that Claimant was suffering from a permanent binaural hearing loss that was made manifest to Respondent on an audiogram performed in the course of regularly conducted shipyard clinic activity by Bath Iron Works in 1954. The December 29, 1954 audiogram administered by the Bath Iron Works

infirmary disclosed that Claimant had a binaural hearing loss of 40.6% at that time. The 1954 audiogram results were converted from the older ASA standard to the revised ANSI specifications, which calculated to a 40.6% binaural hearing loss. Despite its awareness of that hearing loss, Respondent retained Claimant as an employee until his retirement in 1972. The record indicates that, after 1954, Claimant suffered further hearing loss at work which combined and coalesced with his prior permanent hearing loss so as to render his 1985 hearing loss to be of greater magnitude than in 1954. The 1954 audiogram was admitted into evidence thereby allowing for consideration of its probative value by weighing it in conjunction with the totality of the record evidence. I further take into consideration the testimony of Drs. Dixon and Haughwout that established that the December 29, 1954 audiogram taken at Bath Iron Works revealed a permanent hearing loss unrelated, in part, to occupational noise exposure. Thus, Employer was made aware of a pre-existing permanent partial disability, part of which was unrelated to a work injury, and retained Claimant in employment for several years until his retirement in 1972. Therefore, I conclude that this audiogram represents the best available evidence of the extent of Claimant's pre-existing binaural hearing loss of 40.6% during his employment at Bath Iron Works in 1954, which combined and coalesced with the subsequent hearing loss to result in a total binaural hearing loss of 82.4% attributed, in part, to harmful noise exposure at Respondent's shipyard.

The Director has presented no tangible evidence which would support a position that Section 8(f) relief

should not be made available to the Respondent in this case. Based upon this fact, in conjunction with those facts and circumstances just mentioned above, I find all the requirements for Section 8(f) applicability to have been met, and hence conclude that Employer is entitled to the relief afforded by that Section of the Act.

Inasmuch as the employer is entitled to Section 8(f) relief, the compensation due must be apportioned between the employer and the Special Fund. I find that the total compensable binaural hearing loss is 82.4%. Accordingly, I determine that the compensation due for a binaural hearing loss pursuant to Section 8(c)(13) of the Act attributable to 82.4% of 200 weeks represents a payment of such compensation for a total of 164.8 weeks. I determine that the Employer is liable for compensation attributable to 41.8% of 200 weeks which represents 83.6 weeks while the Special Fund is liable for payment of such compensation for 40.6% of 200 weeks which represents 81.2 weeks.

With regard to medical expenses, it has been held that a claim for payment or reimbursement of such expenses is never time barred. *See Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). However, in order to be entitled to reimbursement of medical expenses, a Claimant must comply with the requirements set forth in Section 7 of the Act. As previously determined, the Claimant was exposed to injurious noise levels while employed at Bath Iron Works and therefore has sustained an injury cognizable under the Act. In connection with Claimant's claim for reimbursement for these expenses, it is noted that counsel for the Claimant, in a letter dated September 23, 1985, requested Bath Iron Works to authorize medical

services. However, at no time did the Claimant introduce evidence that the medical provider had furnished a report within ten days following such treatment as required by Section 7(d)(2) of the Act. Notwithstanding the requirements of Section 7(d)(2), I excuse the failure to furnish the report within the ten day period insofar as I determine it to be in the interest of justice to do so. It is noted that the Employer is not prejudiced by the failure of the medical provider to file its report because the Employer was aware of the injury by reason of the filing of the claim on September 20, 1985 and was apprised by Claimant's attorney on September 23, 1985 that he was seeking authorization for medical treatment. *Rogers Terminal and Shipping Corp. v. Director*, 18 BRBS 79 (CRT 1986). Furthermore, there is no record evidence of the Employer or Carrier having responded to Claimant's request for authorization of a medical evaluation. I approve the reimbursement of those medical expenses Claimant incurred in the amount of \$55.00 for the September 24, 1985 evaluation and the November 1, 1985 report from Dr. Haughwout and \$74.80 for a hearing aid repair and consultation by the Pine Tree Society. Additionally, it is noted that these expenses were incurred for litigation purposes and are also recoverable under Section 28 of the Act. I thus conclude that the Bath Iron Works and Commercial Union Insurance Company are responsible for reimbursement of Claimant's past medical expenses.

Inasmuch as the Claimant has proved the existence of a work-related injury, he is entitled to reimbursement for reasonable and necessary future medical expenses related thereto cognizable under Section 7 of the Act. *Mattox v.*

Sun Shipbuilding Co., 15 BRBS 162 (1982). Bath Iron Works and Commercial Union Insurance Company are also obligated under the Act to pay for or to reimburse the Claimant for all such future reasonable and necessary medical expenses as are related to the work-related injury which the Claimant sustained on September 6, 1985 subject to the provisions of Section 7 of the Act.

Claimant's attorney may file an attorney fee application in view of the successful prosecution of this case matter. He shall file an application which comports with the requirements of 20 C.F.R. 702.132 and will serve a copy upon the employer and responsible carrier who will have ten days following receipt thereof to file objections thereto.

The Claimant is entitled to interest on any accrued unpaid compensation benefits, such interest to be computed at the rate prescribed by 28 U.S.C. 1961.

Based on the foregoing findings of fact and conclusions of law, I make the following compensation order. The specific dollar computations of the compensation order shall be administratively performed by the Deputy Commissioner.

ORDER

It is therefore ORDERED that:

1) Bath Iron Works and the Commercial Union Insurance Company shall pay to the Claimant compensation for permanent partial disability pursuant to Section 8(c)(13) of the Act for a 41.8% binaural hearing loss, based on a national average weekly wage of \$289.83,

commencing on September 6, 1985 for a period of 83.6 weeks.

2) Thereafter, the Special Fund, pursuant to the provisions [sic] of Section 8(f) of the Act, shall pay to the Claimant compensation for permanent partial disability pursuant to Section 8(c)(13) of the Act, for a 40.6% binaural hearing loss, based on a national average weekly wage of \$289.83, for a period of 81.2 weeks.

3) Interest shall be computed at the rate specified in 28 U.S.C. 1961 that is in effect when this decision and order is filed in the Office of the Deputy Commissioner on all accrued benefits computed from the date each payment was originally due until paid.

4) Bath Iron Works and Commercial Union Insurance Company shall reimburse the Claimant for the \$55.00 expended in connection with the September 24, 1985 examination and the November 1, 1985 report of Dr. Haughwout and \$74.80 expended in connection with his hearing aid repair and consultation by the Pine Tree Society for Handicapped Children and Adults pursuant to Section 7 of the Act.

5) Bath Iron Works and Commercial Union Insurance Company shall pay for or reimburse Claimant for the reasonable costs of such medical care and treatment related to the Claimant's work-related injury of September 6, 1985, subject to the provisions of Section 7 of the Act.

/s/ Martin J. Dolan, Jr.
MARTIN J. DOLAN, JR.
Administrative Law Judge

Dated: OCT 03 1988
Boston, Massachusetts
MJD:dr

APPENDIX D

Longshore and Harbor Workers' Compensation Act
[33 U.S.C. § 902(10)]

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

Longshore and Harbor Workers' Compensation Act
[33 U.S.C. § 908(c)(1 - 13, 21, 23)]

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee, as follows:

- (1) Arm lost, three hundred and twelve weeks' compensation.
- (2) Leg lost, two hundred and eighty-eight weeks' compensation.
- (3) Hand lost, two hundred and forty-four weeks' compensation.
- (4) Foot lost, two hundred and five weeks' compensation.

- (5) Eye lost, one hundred and sixty weeks' compensation.
- (6) Thumb lost, seventy-five weeks' compensation.
- (7) First finger lost, forty-six weeks' compensation.
- (8) Great toe lost, thirty-eight weeks' compensation.
- (9) Second finger lost, thirty weeks' compensation.
- (10) Third finger lost, twenty-five weeks' compensation.
- (11) Toe other than great toe lost, sixteen weeks' compensation.
- (12) Fourth finger lost, fifteen weeks' compensation.
- (13) Loss of hearing:
 - (A) Compensation for loss of hearing in one ear, fifty-two weeks.
 - (B) Compensation for loss of hearing in both ears, two-hundred weeks.
 - (C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

* * *

(21) Other cases: In all other cases in the class of disability, the compensation shall be $66\frac{2}{3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

* * *

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be $66\frac{2}{3}$ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

Longshore and Harbor Workers' Compensation Act
[33 U.S.C. § 910(d)(2)]

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i)) occurs -

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 6(b)) applicable at the time of the injury.

Longshore and Harbor Workers' Compensation Act
[33 U.S.C. § 910(i)]

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

MAR 3 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, ETC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, the amount of benefits payable to a retired claimant who suffered an employment-related hearing loss is calculated (a) under 33 U.S.C. 908(c)(13), which provides a scheduled award for loss of hearing; (b) under 33 U.S.C. 908(c)(23), which provides benefits when a worker's disability occurs after retirement; or (c) under a hybrid approach that uses parts of both 33 U.S.C. 908(c)(13) and 908(c)(23).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-871

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, ETC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 942 F.2d 811. The decision and order of the Benefits Review Board (Pet. App. 21-30) is reported at 24 Ben. Rev. Serv. (MB) 89 and the decision and order of the administrative law judge (Pet. App. 31-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1991. The petition for a writ of certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATEMENT

1. Prior to 1984, Section 8 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 908, provided two systems for compensating permanently partially disabled workers. The first system (System One)¹ covers workers suffering one of the "scheduled" injuries listed in Section 8(c)(1)-(20), 33 U.S.C. 908(c)(1)-(20). The formula set out in System One provides that the injured worker is entitled to two-thirds of his average weekly wage for a finite number of weeks (ranging from 16 to 312), depending upon the type of injury. 33 U.S.C. 908(c). The injuries listed in the System One schedule are compensated at the specified amount "regardless of whether [the employee's] earning capacity has actually been impaired." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 269 (1980). The second system (System Two), which is not directly at issue in this case, is used to compensate workers for injuries that are not listed in the "schedule." 33 U.S.C. 908(c)(21). The formula set out in System Two provides that a worker receives two-thirds of the difference between his average weekly wage prior to the injury and his residual earning capacity for as long as the disability persists. *Ibid.*

In *Aduddell v. Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131, 133 (1984), the Benefits Review Board held in a case arising under System Two that a claimant who voluntarily retired prior to the manifestation of asbestosis (which is not a scheduled injury) was not entitled to any compensation because he could not establish that his injury caused

¹ In this brief, we have used the First Circuit's terminology regarding the three compensation "systems" under the LHWCA. See Pet. App. 2-3.

any loss of wage-earning capacity. Accord *Worrell v. Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 216 (1983); *Dunn v. Todd Shipyards Corp.*, 13 Ben. Rev. Bd. Serv. (MB) 647 (1981); see also *Newport News Shipbuilding & Dry Dock v. Director, OWCP*, 681 F.2d 938, 942 (4th Cir. 1982). The Board extended the *Aduddell* principle to System One in *Redick v. Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. (MB) 155 (1984), and held that a person who filed a claim for hearing loss—which is a scheduled injury—six months after he retired was not entitled to benefits because he could not show that the injury impaired his earning capacity.

In 1984, Congress reacted to the inequity it perceived in the Board's treatment of retirees in the *Aduddell* line of cases. The amendments created a third scheme (System Three) to compensate retired workers whose diseases manifest themselves after retirement. Section 10(i), 33 U.S.C. 910(i), defines the "time of injury" for a claim involving a disease "which does not immediately result in death or disability" as "the date on which the employee or claimant becomes aware [or should have become aware] * * * of the relationship between the employment, the disease, and the * * * disability."² For purposes of the formula set forth for computing benefits under

² The 1984 amendments provided that the worker must notify the Department of Labor and the employer of "an occupational disease which does not immediately result in a disability or death" within one year after he becomes aware (or should have become aware) of the relationship between the disease and his employment, and must file a claim within two years. 33 U.S.C. 912(a), 913(b)(2). With respect to all other injuries, the worker must give notice within 30 days and file a claim within one year of the injury. 33 U.S.C. 912(a), 913(a).

System Three, the claimant's average weekly wages during his final year of work are used if the "time of injury" is within the first year after retirement. 33 U.S.C. 910(d)(2)(A). If the "time of injury" is more than one year after retirement, then the national average weekly wage at that time is used. 33 U.S.C. 910(d)(2)(B). In either case, the formula for calculating benefits under System Three calls for multiplying two-thirds of the appropriate average weekly wage by the worker's percentage of permanent impairment as determined by the *Guides to the Evaluation of Permanent Impairment* (rev. 3d ed. 1990), which is published by the American Medical Association. 33 U.S.C. 908(c)(23); see 33 U.S.C. 902(10). The claimant is entitled to weekly benefits for the duration of the impairment. 33 U.S.C. 908(c)(23).

The benefits awarded under System Three may be greater than those awarded under System One because an award under System Three is paid weekly for as long as the worker is impaired rather than for a scheduled number of weeks. On the other hand, the award under System Three may be less than the award under System One because an award under System Three is based on the impairment of the "whole person."³ And the amount of benefits payable under System One and System Three may differ be-

³ For example, under System One, the respondent, Ernest C. Brown, would be entitled to two-thirds of his average weekly wage during the last year he worked for the number of weeks prescribed in Section 8(c). Section 8(c)(13)(B) provides for 200 weeks of recovery in the case of a binaural hearing loss; under Section 8(c)(19), that period would be reduced because Brown sustained an 82.4% hearing loss rather than a total hearing loss, so that he would receive an award for about 165 weeks (200 weeks times .824). But an 82.4% hearing loss translates into a 29% impairment of the

cause the worker's average weekly wage (which is always used under System One) may be more or less than the national average weekly wage at the time of injury (which is used under System Three when the time of injury is more than one year after the worker retires).

The 1984 amendments did not change the basic principles governing System One or System Two. However, Congress changed the rules governing the time within which to file a hearing loss claim under System One by adding Section 8(c)(13)(D), 33 U.S.C. 908(c)(13)(D), which provides that "[t]he time for filing a notice of injury * * * shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." See also 20 C.F.R. 702.221 (b). Thus, a worker who suffers a hearing loss, but does not recognize that his hearing has been impaired, does not lose his claim on account of the passage of time.

2. The claimant in this case, Ernest C. Brown, worked for petitioner Bath Iron Works from 1939 until 1947, and again from 1950 until his retirement in 1972. Pet. App. 22. In 1985, after receiving the results of an audiogram that indicated an 82.4% hearing loss in both ears, Brown applied for benefits. *Id.* at 9.⁴ The administrative law judge found that

"whole person" under the AMA Guide. Pet. App. 23. Thus, under System Three, Brown would receive a lower weekly payment—two-thirds of the applicable weekly wage times .29. However, under System Three he would receive the award for as long as he was impaired.

⁴ Brown relied on the tolling provision for scheduled hearing losses under System One, Section 8(c)(13)(D), to excuse

Brown's "hearing loss resulted, in part, from * * * acoustic trauma experienced while * * * employed at the Bath Iron Works shipyard and thus his hearing loss arose out of and in the course of his employment in Bath Iron Works." Pet. App. 39.

The ALJ, applying the approach sanctioned by the Benefits Review Board, then used a hybrid method to calculate benefits. He first turned to System Three and concluded that the "time of injury" for purposes of determining Brown's average weekly wage was September 6, 1985, when Brown received the results of the audiogram. Pet. App. 40. The ALJ accordingly utilized the national average weekly wage rate under System Three, 33 U.S.C. 910(d)(2)(B), to calculate the amount of scheduled benefits for hearing loss under the formula set out in System One. *Id.* at 37-38. In other words, he used the national average weekly wage on September 6, 1985, as provided under System Three, in place of Brown's weekly wage in the formula set out in System One, but limited the award to a total of 165 weeks, as set forth in System One, instead of awarding compensation for the indefinite future, as set forth in System Three. See note three, *supra*.⁵

the 13-year gap between the time that he stopped working and the time that he filed his claim. The administrative law judge held that Brown's "claim is not time barred" because Brown did not receive an audiogram and accompanying report until 1985. Pet. App. 36. Bath Iron Works has not challenged that conclusion.

⁵ The ALJ also determined that Bath Iron Works was entitled to relief from the "special fund" established by 33 U.S.C. 944 because Brown had a preexisting disability that was aggravated by his working conditions. Specifically, the ALJ allocated the liability for Brown's 82.4% hearing loss such that the fund was liable for payments based on a 40.6%

The Board upheld the ALJ's determinations. Relying on its prior en banc decision in *Machado v. General Dynamics Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 176 (1989), and the Fifth Circuit's decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088 (1990), the Board agreed with the ALJ that the "time of injury" and, hence, the applicable average wage, was properly determined under System Three. Pet. App. 24. But the Board did not agree with the Fifth Circuit's conclusion in *Ingalls Shipbuilding* insofar as the court held that benefits should be calculated under the formula set out in System Three in a hearing loss case brought by a retired claimant. The Board instead adhered to its *Machado* decision and held that benefits must be awarded under the formula set out in System One in a hearing-loss case. *Id.* at 25. Accordingly, the Board affirmed the ALJ's use of a hybrid approach.⁶

3. The court of appeals agreed with respondent, the Director of the Office of Workers' Compensation

hearing loss (the hearing loss that Brown had suffered by 1954) while Bath Iron Works was responsible for the remaining 41.8% hearing loss. Pet. App. 42-43.

⁶ Two of the Board's five members agreed with the Fifth Circuit's conclusion in *Ingalls Shipbuilding* that benefits should be calculated under System Three rather than the Board's hybrid approach. One of those Board members dissented on that ground (McGranery, J., Pet. App. 29-30), but the other (Stage, J., Pet. App. 27-28) concurred on the ground that the Board should adhere to its *Machado* decision until the First Circuit had an opportunity to rule on the issue. A third Board member (Brown, J., Pet. App. 28-29) agreed with the Board's hybrid approach, but dissented because he thought that Bath Iron Works should be responsible for the entire amount of Brown's award and should not obtain relief from the "special fund" established by 33 U.S.C. 944; that issue is not before the Court.

Programs, that System One should apply in its entirety. The court concluded that the statute, although seeming complex, "basically says something that is fairly simple: When the 'time of injury' occurs before retirement, the Labor Department should calculate compensation under either System One (if the injury is scheduled) or System Two (if the injury is not scheduled). When the 'time of injury' occurs after retirement, the Labor Department should calculate compensation under System Three." Pet. App. 7-8. Thus, in the court's view, the determination of which system applies does not turn on whether the claimant was working or retired when he applied for benefits, but on whether his occupational hearing loss occurred before or after retirement.

The court then agreed with the Director that occupational hearing loss, unlike diseases such as asbestosis that have a long latency period, is an injury that "a worker typically suffers *before* retirement." Pet. App. 12. The court found this conclusion supported by the scientific literature, which Bath Iron Works had not challenged, and by the Board's own characterization of Brown's hearing loss. *Ibid.* The court accordingly concluded that the law "mandate[s] compensation according to System One." *Ibid.* Indeed, the court concluded that the "language applicable to System Three makes clear that that System does not apply at all," *ibid.*, because System Three applies only to disabilities "due to an occupational disease which does not immediately result in * * * disability," 33 U.S.C. 910(i). Ascribing the "ordinary English" meaning to the statutory language, the court concluded that job-related hearing loss asserted by a retiree does not fit the System Three standard since "deafness is a disease that causes its symptoms,

namely loss of hearing, simultaneously with its occurrence." Pet. App. 13.

The court added that it was not necessary to adopt a hybrid approach such as that employed by the Board lest employees like Brown be denied recovery altogether, as the Board had held in *Redick*. In that case the Board had stated that the employee's hearing loss "manifested" itself after retirement. Thus, the Board may have erroneously believed that hearing loss has a latency period, like asbestosis, or believed that it was dealing with a special case of delayed hearing loss. Pet. App. 15. But if the Board meant that the claimant could not recover under System One, even though he had been injured before he retired, "the holding in *Redick* was simply wrong," the court concluded. *Id.* at 16. The court explained that although the Board had relied on the statutory definition of "disability," which is the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10), "incapacity" does not mean "failure, in fact, to earn prior wages." Rather, it has long been settled that "the statute *presumes* that a worker who suffers a scheduled injury suffers an 'incapacity because of injury to earn' prior wages." Pet. App. 16, citing *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2d Cir.), cert. denied, 350 U.S. 913 (1955); see also *Potomac Elec. Power Co.*, 449 U.S. at 269 (under System One the injured worker is entitled to the scheduled recovery "regardless of whether his earning capacity has actually been impaired").

The court of appeals also explicitly rejected the Fifth Circuit's approach, as expressed in *Ingalls Shipbuilding*, that System Three governed. In *Ingalls Shipbuilding* the Fifth Circuit had acknowl-

edged, but found irrelevant, the fact that hearing loss differs from asbestosis in that "the full extent of the claimants' injuries is set on the day they leave the workplace." 898 F.2d at 1093. In this case, in contrast, the First Circuit concluded that the statutory language "treats a hearing loss case differently than an asbestosis case for the very reason that the Fifth Circuit found irrelevant," i.e., because "the 'time of injury' in the first case, but not the second case, is prior to retirement." Pet. App. 18.⁷

DISCUSSION

Although the decision of the court of appeals is correct, we do not oppose the petition. The decision of the court of appeals in this case is in direct conflict with the Fifth Circuit's decision in *Ingalls Shipbuilding* and with the Eleventh Circuit's more limited ruling in *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561 (1991). Moreover, the fact that the Board takes yet a third approach further disrupts the administration of the Longshore Act. The issue is significant because there are currently almost 7,000 outstanding hearing loss cases pending, the majority of which involve retirees. Benefits due these retirees are accordingly now calculated under three different formulas, with the potential for widely

⁷ The court of appeals recognized that the Board had not calculated Brown's award properly under the formula set out in System One because, under its hybrid approach, it had used the national average wage (as System Three provides) rather than Brown's actual wage. But since neither Bath Iron Works nor the Director had asked the court of appeals to recalculate the award, and Brown profited since the error resulted in a higher payment, the court of appeals "consider[ed] the issue waived" and affirmed the Board's judgment. Pet. App. 19-20.

divergent results, depending upon the jurisdiction in which the claim is litigated. This defeats a central purpose of the statute—to provide uniform compensation to longshore workers nationwide.

1. a. The First Circuit acknowledged that its ruling in this case conflicts with the Fifth Circuit's decision in *Ingalls Shipbuilding*, which concerned the "identical" legal issue. Pet. App. 11. That is so. *Ingalls Shipbuilding* involved claims by three retired employees for work-related hearing loss. 898 F.2d at 1090. The Fifth Circuit agreed with the Board that the "time of injury", and therefore the applicable wage rate, is determined under System Three's Section 10(i). The court, however, reversed the Board's decision to utilize the other aspects of the formula set out in System One. The Board's decision to use parts of both systems, the court said, ignores the plain language of Section 10(i), which says that System Three applies "notwithstanding" the System One schedule. 898 F.2d at 1094, 1096.

In proceeding to decide which of the two systems governed in its entirety, the Fifth Circuit in *Ingalls Shipbuilding*, like the Board and the First Circuit here, accepted "[t]he fact that hearing loss does not progress after retirement." 898 F.2d at 1093.⁸ The

⁸ Petitioner does not disagree. Instead, petitioner argues, Pet. 8, that because claimants may be compensated for their entire hearing loss, including age-related hearing loss (presbycusis) occurring after retirement, it follows that their occupational injuries occurred after retirement. That argument misses the mark. Even where claimants are compensated for hearing loss that resulted from both occupational deafness and presbycusis, the fact that the presbycusis, which is not an occupational disease, progressed after retirement is irrelevant to determining when the occupational injury occurred. The scientific literature refutes the notion that occu-

Fifth Circuit nonetheless concluded that hearing loss is covered by System Three, which encompasses only injuries from "an occupational disease which does not immediately result in death or disability." Section 10(i); see 898 F.2d at 1092-1094.

Instead of following the statutory language, which provides that System Three is not applicable to job-related hearing loss that occurs before retirement, the Fifth Circuit relied on the legislative history of the 1984 amendments. Specifically, the *Ingalls Shipbuilding* court placed great weight on the fact that Senator Hatch, a sponsor of the 1984 amendments, listed *Redick* (the Board's opinion holding that a retired claimant is not entitled to benefits for hearing loss) as one of several cases that were inconsistent with "equitable policy." 130 Cong. Rec. 26,300 (1984). The Fifth Circuit read Senator Hatch's comment as establishing that Congress intended that hearing loss claims be treated the same as claims based on progressive occupational diseases. 898 F.2d at 1093. As the First Circuit recognized in this case, however, the Fifth Circuit's reliance on Senator Hatch's remark "seeks to prove far too much on the basis of far too little." Pet. App. 17. Senator Hatch's remark is the only reference to *Redick* in a legislative history of the 1984 amendments, which focused on latent diseases, such as asbestosis, that actually develop and progress after retirement.⁹ The important

pational hearing loss progresses after retirement. See R. Sataloff & J. Sataloff, *Occupational Hearing Loss* 357 (1987).

⁹ In contrast, Representative Miller twice mentioned the Board's asbestosis decision in *Aduddell*, without mentioning *Redick*. 130 Cong. Rec. 25,902-25,903 (1984). So too, the conference report mentions *Aduddell* without mentioning *Redick*. H.R. Conf. Rep. No. 1027 (Conf. Rep.), 98th Cong., 2d Sess. 30 (1984).

point about Senator Hatch's remark is that he thought that *Redick* did not represent "equitable policy." In fact, as the First Circuit suggested, Pet. App. 15-17, *Redick* was incorrectly decided under the pre-1984 law. Contrary to the Board's reasoning, evidence of actual loss of wages or wage-earning capacity has never been required under System One, because the schedule *presumes* the loss. See *Potomac Elec. Power Co.*, 449 U.S. at 276-277 & n.15, citing *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2d Cir.), cert. denied, 350 U.S. 913 (1955). In any event, the Fifth Circuit erred in relying on legislative history to overcome the clear statutory language, which shows that System Three applies only to injuries or diseases, unlike Brown's hearing loss, which do "not immediately result" in disability. 33 U.S.C. 910(i).

b. The First Circuit's decision in this case is also at odds with the Eleventh Circuit's decision in *Alabama Dry Dock*. That case involved a hearing loss claim by a self-employed individual, rather than a retiree, and the court was not called upon to decide how to calculate benefits for retirees with occupational hearing loss. Like the Fifth Circuit in *Ingalls Shipbuilding*, however, the Eleventh Circuit concluded that the "time of injury" in a hearing loss case is governed by Section 10(i), which is part of System Three. 933 F.2d at 1566-1568. In other words, the "time of injury" in those two circuits is when the claimant is or should be aware of the relationship between the employment, the disease and the disability, rather than the date of the claimant's last exposure on-the-job, as in the First Circuit. Compare *Alabama Dry Dock*, 933 F.2d at 1566-1567, with Pet. App. 14, 19.

In *Alabama Dry Dock* the court reasoned that, even if occupational hearing loss does not progress after

the worker leaves employment, the statute is silent concerning the "time of injury" that applies in such cases. 933 F.2d at 1566-1567. The court decided that Congress must have intended for System Three's "time of injury" standard to govern *all* cases involving occupational diseases, including hearing-loss cases, despite the fact that Section 10(i) refers only to those occupational diseases which do "not immediately result in death or disability." *Id.* at 1567-1568. In reaching that conclusion, the court stressed that the phrase "occupational disease which does not immediately result in death or disability," although mentioned three times in the statute, "is not explained, or indeed even mentioned, anywhere in the conference report or, so far as we can tell, elsewhere in the legislative history." *Id.* at 1567.¹⁰ Of course, it is improper to ignore the statutory language on account of an absence of legislative history making clear that the statute should be applied as written. But in fact, the House Report accompanying the 1984 amendments fully supports the interpretation of this phrase urged by the Director and accepted by the First Circuit in this case. The Report states:

A long-latency disease is described, both for the purpose of this section [Section 13(a)] and the section 12(a) amendments, to mean a disease which does not immediately result in death or disability. By this, the Committee means to describe disabling conditions which do not develop

¹⁰ The court also found it significant that the discussion of Section 10(i) in the conference report, Conf. Rep. at 29-30, merely refers to claims involving occupational diseases and seemingly does not draw a distinction among occupational diseases. 933 F.2d at 1567. That is irrelevant, however, because the statutory language distinguishes between diseases that do not immediately result in disability (like asbestosis) and those that do (like occupational hearing loss).

immediately after the initial change in the body of the worker resulting from the exposure to a toxic substance or harmful physical agent, or which do not even result in a change in the body immediately after the exposure to the causative toxic substance or harmful physical agent.

H.R. Rep. No. 570, 98th Cong., 1st Sess. 11 (1984).

c. The Board follows yet a third approach. In a hearing loss case, the Board determines "time of injury," and thus the applicable average weekly wage, under System Three, yet nevertheless uses the other parts of the formula set out in System One to calculate the award. Pet. App. 21-27. The Board's views are not entitled to deference, since the Board is not charged with administering the Act. *Potomac Elec. Power Co.*, 449 U.S. at 278 n.18.¹¹

¹¹ A number of courts have held that the Director's statutory analysis, on the other hand, is entitled to deference, since the Director administers the Act. *Newport News Shipbuilding and Dry Dock v. Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *McDonald v. Director, OWCP*, 897 F.2d 1510, 1512 (9th Cir. 1990); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1262 (11th Cir. 1990); and *Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 1235 (5th Cir. 1989). But other courts have refused to pay deference to the Director's analysis, particularly when the Director's statutory interpretation was developed in the course of litigation rather than "through the promulgation of regulations." *Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990); see also *Sea-Land Service, Inc. v. Rock*, No. 91-3161 (3d Cir. Jan. 7, 1992), slip op. 7; and *American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989). In this case, deference is due the Director's construction of the statute because he has consistently interpreted the statute to call for the payment of occupational hearing loss benefits under System One rather than System Three. That is shown by 20 C.F.R. 702.212, which requires a hearing loss claimant

2. Thus, three competing—and conflicting—approaches may apply to calculating the benefits due to a retiree for an occupational hearing loss: (1) the First Circuit's and the Director's approach (System One applies in its entirety); (2) the Fifth Circuit's approach (System Three applies in its entirety); and (3) the Board's hybrid approach (System Three is used to determine the average weekly wage, but the formula set out in System One is used to calculate benefits).¹² This conflict undermines the Act's central goal of providing "nationwide uniformity" for claims brought by injured maritime workers. See *Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 187 (5th Cir. 1991), citing *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

The conflict is significant because of the large number of hearing loss claims brought by retired longshore and harbor workers. There are currently 6,855 open hearing loss cases at all levels of adjudication nationwide. Those cases represent approximately

to give notice of his injury within 30 days of the date of injury, which is specially defined in light of the 1984 amendments to System One as the date on which the claimant received an audiogram and accompanying report revealing an occupational hearing loss. The regulation does not provide for notice within one year of the date of awareness of an occupational disease that does "not immediately result in death or disability," as provided under System Three. The Director explained that a hearing loss claimant is not subject "to the extended time requirements applicable to occupational diseases that do not immediately result in disability or death, since a hearing loss could entitle an employee immediately to a schedule award of compensation" under System One. 50 Fed. Reg. 389 (1985).

¹² Since the Eleventh Circuit has decided that the "time of injury" is determined under System Three, it presumably would agree with the Fifth Circuit's approach, although it is possible that it would adopt the Board's hybrid approach.

eleven percent of all outstanding Longshore and Harbor Workers' Compensation Act claims. The Director does not maintain statistics that would conclusively show how many hearing loss claims are brought by retirees, as opposed to claimants who are still working, but in the Director's experience the clear majority of hearing loss claims are filed by retirees. There is also indirect evidence that a large number of claims are affected because, while the relevant Fifth and Eleventh Circuit cases were pending, hundreds of cases were held in abeyance at the Board level. Following the court's decisions, motions to have benefits recalculated have been filed in many of those cases. Thus, the conflict on the legal issue presented by this case has greatly disrupted, and most likely will continue to disrupt, the administrative process.

CONCLUSION

For the reasons set forth, we do not oppose the petition for a writ of certiorari.

Respectfully submitted.

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MARCH 1992

3
No. 91-871

Supreme Court, U.S.
FILED

MAY 7 1992

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In The
Supreme Court of the United States
October Term, 1991

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Petitioners,

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DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit

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May 7, 1992

QUESTION PRESENTED FOR REVIEW

Should benefits for loss of hearing sought by retired workers under the Longshore and Harbor Workers' Compensation Act be awarded under 33 U.S.C. § 908(c)(13), which governs claims for loss of hearing, or under 33 U.S.C. § 908(c)(23), which governs claims by retirees?

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¹ All parties to the proceeding below appear in the caption of the case with the exception of the employee, Mr. Ernest C. Brown. Bath Iron Works is a Maine corporation whose common stock is owned by Fulcrum II, a New York partnership, and Prudential Insurance Company of America.

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OPINIONS BELOW

The decree of the First Circuit Court of Appeals dated August 27, 1991 and reported at *Bath Iron Works v. Director, OWCP*, 942 F.2d 811 (1st Cir. 1991) appears as an appendix to the Petition for a Writ of Certiorari at App. 1. The Decision and Order *En Banc* of the Benefits Review Board dated November 26, 1990 and cited at 24 BRBS 89 (1991) is reproduced at App. 21. The unreported Decision and Order of the Administrative Law Judge dated October 3, 1988 is reproduced at App. 31.



GROUND ON WHICH JURISDICTION WAS INVOKED

The decree of the First Circuit Court of Appeals was entered on August 27, 1991 (App. 1). The Petition for a Writ of Certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).



STATUTORY PROVISIONS INVOLVED

The provisions of the Longshore and Harbor Workers' Compensation Act at issue concern benefits for loss of hearing, benefits for retirees and time of injury. They appear as an appendix to the Petition for Writ of Certiorari beginning at App. 48, and they include the following:

33 U.S.C. §902(10)

33 U.S.C. §908(c)(1-13, 21, 23)

33 U.S.C. §910(d)(2)

33 U.S.C. §910(i).

STATEMENT OF THE CASE

Mr. Ernest C. Brown (hereinafter "Employee" or "Mr. Brown") was exposed to loud noise while working as a riveter and chipper for Bath Iron Works (hereinafter "BIW" or "Employer") in Bath, Maine (App. 33). He worked from 1939 until 1947 and again from 1950 until he voluntarily retired in 1972 (*Id.*).

On September 20, 1985, Mr. Brown filed a claim for permanent partial disability under the Longshore and Harbor Workers' Compensation Act (hereinafter "the Act" or "the LHWCA"). He alleged a binaural loss of hearing caused by occupational noise.

An Administrative Law Judge with the Department of Labor (herein "the ALJ") held on October 3, 1988 that Mr. Brown's "time of injury" under 33 U.S.C. §910(i) was the date in 1985 on which he received an audiogram, but that compensation was payable under 33 U.S.C. §908(c)(13) (App. 37, 40).

BIW appealed to the Benefits Review Board of the Department of Labor (hereinafter "Board"). The Respondent, Director of the Office of Workers' Compensation Programs of the Department of Labor (hereinafter "Director"), participated in the appeal.

The Board affirmed the ALJ on November 26, 1990, but two of its five members wrote separately to express the opinion that benefits should be calculated under 33

U.S.C. §908(c)(23), which governs claims by retirees, rather than under §908(c)(13), which governs claims for loss of hearing (App. 27-30). The Board rejected the Director's argument that the "time of injury" occurred when Mr. Brown retired in 1972 (App. 24).

BIW filed a Petition for Review with the First Circuit Court of Appeals. The First Circuit affirmed the Board's holding that compensation was payable under §908(c)(13), but disagreed with its reasoning. The Court accepted the Director's argument that the "time of injury" occurred in 1972 and that §908(c)(23) was therefore not applicable (App. 19).

BIW filed a Petition for a Writ of Certiorari on November 25, 1991. The Petition was granted by this Court on March 23, 1992.

SUMMARY OF THE ARGUMENT

The LHWCA provides that a worker with an occupational loss of hearing may receive compensation for that permanent partial disability under 33 U.S.C. §908(c)(13). However, in early 1984, the Board *denied* a hearing loss claim filed by a retiree since a voluntary retiree cannot demonstrate a loss of wage earning capacity. The Board cited an earlier decision in which it denied a retiree's claim for benefits based upon asbestosis.

These decisions prompted Congress to include within the Act's 1984 Amendments a limited benefit for voluntary retirees whose occupational diseases become manifest after retirement. The First Circuit, however, held that

the Amendments do not apply to claims for loss of hearing because loss of hearing is not "an occupational disease which does not immediately result in death or disability" under §910(i). Admittedly, if §910(i) does not apply, then benefits must be calculated under §908(c)(13) rather than §903(c)(23).

The First Circuit's decision, however, is wrong for two reasons. First, a compensable loss of hearing often does and in this case did include age-related hearing loss or presbycusis, which does *not* immediately result from exposure to loud noise. Therefore, §910(i) *does* apply. Second, the construction of the statute urged by BIW and accepted by the Fifth and Eleventh Circuits carries out Congress's intent as demonstrated by the language of the statute and its legislative history. Therefore, if §910(i) is ambiguous, it should be construed in a manner consistent with Congress's intent to compensate all retirees under §908(c)(23) for diseases that become "manifest" after retirement.

ARGUMENT

1. Introduction.

The LHWCA was enacted by Congress in 1927 to compensate maritime workers for "disability"² caused by

² 33 U.S.C. §902(10) defines "disability" as follows:

"(10) 'Disability' means incapacity because of injury to earn the wages which the employee was
(Continued on following page)

work. See *Fleetwood v. Newport News Shipbuilding & Dry Dock*, 776 F.2d 1225, 1226-27 (5th Cir. 1985); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634 (1983). The Act provides that an employee who is permanently and totally disabled shall receive a weekly benefit equal to two-thirds of his average weekly wage. 33 U.S.C. §908(a). It allows a like benefit for the duration of any *temporary* total disability. 33 U.S.C. §908(b). It also allows a proportionate benefit for temporary *partial* disability. 33 U.S.C. §908(e).

At issue in this case is compensation for disability that is permanent, but partial, in nature. This variety of compensation is payable in addition to benefits for temporary disability. 33 U.S.C. §908(c).

The Act includes three "systems" for compensating disability that is permanent, but partial. Many injured body parts are specifically listed or "scheduled" under 33 U.S.C. §908(c)(1-20). Benefits in these cases are calculated based upon a specified number of weeks of compensation. However, these awards do not require proof of actual wage earning incapacity. *Potomac Elec. Power Co. v. Director, Etc.*, 449 U.S. 268, 269, 101 S. Ct. 509 (1980). This

(Continued from previous page)

receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2)".

system of "scheduled" benefits was labeled by the First Circuit as "system one".

For example, compensation for loss of use of an arm is presumed to equal 312 weeks of compensation. 33 U.S.C. §908(c)(1). Total loss of hearing is worth 200 weeks. 33 U.S.C. §908(c)(13). The actual award equals two-thirds of the employee's average weekly wage times the percent of loss times the scheduled number of weeks. 33 U.S.C. §908(c). In a hypothetical claim for loss of hearing, two-thirds of a \$300 average weekly wage (\$200) times 50 percent loss of hearing times 200 weeks equals a single payment of \$20,000.

Compensation for loss of use of body parts not "scheduled" is calculated as a function of actual lost wage earning capacity. 33 U.S.C. §908(c)(21). Back injuries are a common example. Another example, under what the First Circuit described as "system two", is occupational disease other than hearing loss. This is because hearing loss is the only occupational disease that is "scheduled". 33 U.S.C. §908(c)(13).

A third "system" was added by Congress in 1984 after the Board declined to compensate retirees for permanent partial disability since they are by definition unable to demonstrate a loss of wage earning capacity. These provisions include 33 U.S.C. §§910(d)(2), 910(i), 908(c)(23) and portions of §902(10). They award compensation based upon two-thirds of the retiree's average weekly wage (or the national average if the employee retired more than one year before), times a percentage of whole body permanent impairment under the American

Medical Association Guidelines, payable weekly for the duration of the impairment.

For example, the same 50 percent loss of hearing is equal to an 18 percent whole body impairment under the American Medical Association Guidelines. 18 percent of two-thirds of a \$300 average weekly wage equals \$36 per week, or \$1,872 per year. Whether this or any other employee would fare better with a "scheduled" award or a "retiree" award depends upon how long he lives and, if he retired more than one year before, whether the national average weekly wage is more or less than his average weekly wage.

If 33 U.S.C. §908(c)(23) applies, then it does so *notwithstanding* §908(c)(13).³ §908(c)(23) applies if the average weekly wage is determined under §910(d)(2). The average weekly wage is determined under §910(d)(2) if the "time of injury" defined at §910(i) occurs after retirement. The "time of injury" under §910(i) is the date on which the employee becomes or should become aware of the relationship between his employment and his

³ 33 U.S.C. §908(c)(23) reads as follows:

"(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment".

disability – but only for claims “due to an occupational disease which does not immediately result in death or disability.”

2. The Problem.

The legislative history to the 1984 Amendments and the statutory language itself suggest on their surfaces that Congress intended that claims for loss of hearing be governed by the “retiree” provisions. The legislative history refers to a hearing loss claim submitted by a retiree and the “retiree” statute itself, 33 U.S.C. §908(c)(23), expressly applies *notwithstanding* 33 U.S.C. §908(c)(13), which governs all other claims for hearing loss.

However, 33 U.S.C. §908(c)(23) applies only to claims described under §910(i) as being for “occupational disease which does not immediately result in death or disability”. It is true that, on the one hand, occupational loss of hearing is immediate because it does not progress following exposure to noise. However, on the other hand, an employee’s hearing often worsens after retirement until it becomes “manifest” to the employee.

The problem is whether this language mandates that a retiree’s claim for loss of hearing falls outside the scope of §910(i) despite §908(c)(23) and its legislative history.

3. Three Solutions to the Problem.

a. The Board’s Solution.

Interestingly enough, this problem has spawned three different solutions. The Board has consistently held

that a retiree’s “time of injury” for purposes of asserting a hearing loss claim is his post-retirement date of awareness under 33 U.S.C. §910(i), but that a single lump sum benefit must be calculated and paid under 33 U.S.C. §908(c)(13) rather than weekly payments under 33 U.S.C. §908(c)(23). *Machado v. General Dynamics Corporation*, 22 BRBS 176 (1989); *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989); *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989). However, this “hybrid” solution has been rejected by the First, Fifth and Eleventh Circuits, as well as by BIW and the Director. This is because if §910(i) applies, then §§910(d)(2) and 908(c)(23) must apply under the express terms of the statute.

b. The First Circuit’s Solution.

The Director has routinely submitted that occupational hearing loss, unlike asbestosis, *does* immediately result in disability and that §910(i) is therefore inapplicable.⁴ If this is so, then the doors to §§910(d)(2) and 908(c)(23) are closed while that to §908(c)(13) remains open. Thus, the Director submits (and the First Circuit agrees) that the Board consistently applies the right provision, §908(c)(13), for the wrong reason.

⁴ The Court’s owe deference to official expressions of policy by the Director, who does administer the statute, but settled law precludes them from affording deference to an agency’s litigating position. *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1563 (11th Cir. 1991).

c. The Fifth and Eleventh Circuits' Solution.

In *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990), the Fifth Circuit reversed *Gulley* and *Fairley*. The Court agreed with the Board that the "time of injury" is the date of awareness under 33 U.S.C. §910(i). However, the Fifth Circuit held that the plain language of §908(c)(23) requires that weekly benefits be paid under 33 U.S.C. §908(c)(23). The Court observed that the issue was whether Congress intended to distinguish between hearing loss and other occupational diseases since hearing loss is the only occupational disease that is "scheduled" under the Act. *Id.* at 1092.

The Court reviewed the legislative history to the 1984 amendments and concluded that Congress intended to create a *single scheme* for *all retirees* regardless of the occupational disease at issue. *Id.* at 1094. While the employee argued that the statute's plain language would lead to an absurd result, the Fifth Circuit confirmed that such inequities, whether real, perceived or fact specific, are the business of Congress rather than the Courts:

" * * * Congress was clearly free to compensate retirees at a different rate than active employees. We may not change the statutory scheme to avoid what the Commissioner argues is an inequitable result in this case."

Id. at 1094.

The Director's argument was also rejected by the Eleventh Circuit in *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561 (11th Cir. 1991). The Eleventh Circuit agreed that, for purposes of fixing compensation in hearing loss cases, the "time of injury" occurs

when the employee becomes aware of the relationship between the employment and the disease. *Id.* at 1568. The Court concluded from the statute and its legislative history that §910(i) does *not* reflect a Congressional intent to distinguish hearing loss from other occupational diseases with respect to "time of injury". *Id.*

4. Reasoning of Fifth and Eleventh Circuits is More Persuasive.

a. First Circuit Erred in Accepting Misleading Representations Concerning Hearing Loss.

The Director represented to the First Circuit that occupational hearing loss is not like asbestosis because it does not progress once an employee is removed from occupational noise.⁵ The First Circuit accepted that representation since it was not disputed by any party (App. 12). The Court then concluded that, since hearing loss *does* immediately result in disability, §910(i) is inapplicable (App. 12).

However, while the *occupational* portion of an employee's hearing loss may not change after retirement, a retiree's hearing may still worsen because of age or presbycusis⁶. See R. Sataloff and J.T. Sataloff, *Occupational Hearing Loss* 32, 201, 374, 592 (1987). This distinction is

⁵ The Director cited R. Sataloff and J.T. Sataloff, *Occupational Hearing Loss* 357 (1987).

⁶ "Presbycusis" is defined as "loss of ability to perceive or discriminate sounds as a part of the aging process; the pattern and age of onset may vary". *Stedman's Medical Dictionary* 1135 (24th ed. 1982).

critical because retirees are "routinely" compensated for presbycusis as much as for noise-induced hearing losses. See *Labbe v. Bath Iron Works Corporation*, 24 BRBS 159, 162 (1991).⁷ Indeed, as a practical matter, retirees such as Mr. Brown often delay filing their claims until after retirement not because of ignorance or neglect, but because they don't notice a loss of hearing until post-retirement presbycusis causes that loss to reach a threshold level.

This pattern is no more evident than in the present case. Mr. Brown underwent an audiogram on December 29, 1954 which revealed a 40.6 percent binaural loss of hearing (App. 42). He underwent four additional audiograms following his 1972 retirement; on March 15, 1977, April 17, 1978, December 22, 1983 and August 11, 1986 (App. 34). Dr. Peter Haughwout offered *unrebutted* testimony that Mr. Brown's loss of hearing *progressed* after the 1977 audiogram because of presbycusis (Depo. Dr. Haughwout, p. 8). Indeed, the ALJ found as fact that the compensable 82.4 percent loss of hearing that existed in 1983 resulted from loud noise *as well as from presbycusis* (App. 34-35). Mr. Brown was therefore compensated for a *cumulative* loss of hearing that included presbycusis, and

⁷ Many states, including Maine, address this problem by deducting from an employee's loss of hearing one-half decibel for each year of age over 40 to account for the average annual loss to presbycusis experienced by the average worker. 39 M.R.S.A. §193(7); 1B A. Larson, *Workmens' Compensation Law* §41.54 (1991).

not just for the occupational loss of hearing that existed in 1972.⁸

b. The First Circuit's Decision Contravenes Congress's Intent.

It is evident that what the First Circuit perceived as a clear medico-legal distinction is anything but that. However, if the language in §910(i) is ambiguous, Congress's intent was not.

That Congress intended 33 U.S.C. §908(c)(23) to apply to hearing loss claims is amply demonstrated by the legislative history to the 1984 Amendments. At the very least, Congress did *not* intend that a distinction be drawn between hearing loss and other occupational diseases.

The legislative history confirms that Congress sought to remedy an inequity described just months before in *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984). That case, one of first impression for the Board, involved a claim for asbestosis asserted by an employee who voluntarily retired prior to the manifestation of his disease. The Board denied the claim since the retired employee could not demonstrate a loss of wage earning capacity.

⁸ Contrary to the First Circuit's finding (App. 12), the Board did *not* concede that Mr. Brown's 84 [sic, 82.4] percent loss of hearing existed in 1972. The Board simply observed that the ALJ found an 82.4 percent hearing loss without reference to a date (App. 22). In fact, as noted by the ALJ, the 82.4 percent figure resulted from an audiogram performed on December 22, 1983 (App. 37).

Three weeks later, the Board denied a retiree's claim for hearing loss. In *Redick v. Bethlehem Steel Corporation*, 16 BRBS 155, 157 (1984), the Board cited *Aduddell* for the proposition that,

"[w]here a worker voluntarily and permanently retires for reasons unrelated to his injury prior to manifestation of his injury, he has no disability regardless of whether his injury is to a part of the body covered by the schedule".

Both of these cases were specifically cited by Senator Orrin G. Hatch,⁹ who reported to Congress as follows on September 20, 1984:

" * * * in conference, a series of controversial rulings at the agency level came to the attention of the conferees. In *Abuddell* (sic, *Aduddell*) v. *Owens-Corning Fiberglas* (sic), 16 BRBS 131 (Feb. 28, 1984), the Benefits Review Board denied compensation benefits to a worker who had manifested an occupational disease - asbestosis - after permanently retiring from the work force. The Board viewed the retiree as, by definition, being without a wage-earning capacity. Therefore the disease could not diminish that capacity for purposes of computing compensation. An identical result was reached in *Redick v. Bethlehem Steel Corporation*, 16 BRBS 155 (Mar. 20, 1984). Similarly, in *Worrell v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS (ALJ) 216 (Mar. 15, 1983), an administrative law

⁹ Senator Hatch served as one of three Managers on the Part of the Senate with respect to the 1984 Amendments and was a co-sponsor of the bill that was ultimately approved by Congress.

judge ruled that a widow was not entitled to death benefits where her retired husband died from mesothelioma. * * * .

"The conferees concluded that these interpretations of the Longshore Act did not represent equitable policy. A person's eligibility for compensation should not necessarily be dependent upon the fortuity of when he becomes disabled * * * .

"The conference substitute therefore makes express provision for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease * * * ."

130 Cong. Rec. 26,300 (1984) (statement of Senator Hatch).

These remarks confirm that Congress did intend to include within the "retiree" amendments claims for loss of hearing such as that filed by Mr. Redick. See, e.g., *Director, OWCP v. Perini North River Associates*, *supra*, 459 U.S. at 321. (Congressional intent indicated by legislative reports that identify decisions Congress intended to overrule by Amendments to LHWCA).

The First Circuit, however, chose to dismiss Senator Hatch's reference to *Redick* because (1) perhaps Mr. Redick's symptoms became manifest *after* retirement contrary to the Court's understanding of occupational hearing loss or (2) the holding in *Redick* was "simply wrong" since this Court has held that claims for "scheduled" injuries must be allowed regardless of whether the employee's earning capacity has been impaired. *Potomac Elec. Power Co. v. Director, etc.*, *supra* (App. 15-17).¹⁰ However, the First

¹⁰ Significantly, this case did *not* involve a claim by a retiree.

Circuit's belief that the *Redick* decision was wrong is beside the point. What matters is that Senator Hatch and Congress contemplated that hearing loss claims would fall within the scope of the "retiree" amendments.

The Director, of course, submits that this Court need look no farther than the words "occupational disease which does not immediately result in disability or death" to judge the intent of Congress. However, as noted, this language is replete with ambiguity. For instance, must *all* of the disability be immediate? All of the *claimed* disability? What of conditions that worsen with time? These ambiguities make it impossible to follow this Court's admonition that, in construing the LHWCA, "the wisest course is to adhere closely to what Congress has written". See, e.g., *Washington Metro. Transit Auth. v. Johnson*, 467 U.S. 925, 104 S. Ct. 2827 (1984).

Fortunately, the legislative history sheds additional light on exactly what Congress meant by §910(i). That history confirms that Congress was concerned not with diseases that do not immediately result in any disability in terms of pathology, but ones that do not immediately become "manifest" in terms of the statute.

Congress's concern with "manifestation" is evidenced in the House and Senate Managers Statement of Managers, which discussed the compromise bill that became law. The statement confirms that,

"the conferees agree to a definition of 'disability' in section 2(10) with respect to a case in which an occupational disease manifests itself subsequent to the claimant's date of retirement".

H.R. Conf. Rep. No. 1027, 98th Cong. 2nd Sess. 30, reprinted in 1984 U.S. Code Cong. and Admin. News 2771, 2779.

Thereafter, the House Conference Report confirms that the final bill was intended to assure eligible victims of compensation regardless of when a disease *manifests* itself and that a claimant is given one year from *manifestation* in which to provide notice. 130 Cong. Rec. H9730, H9735 (daily ed. Sept. 18, 1984) (remarks of Reps. Miller and Erlenborn). Representative Miller emphasized that,

"[b]y choosing the period of manifestation, the conferees clearly reject the date of last exposure to an injurious substance as the time of injury. Manifestation, in the context of these 1984 amendments, means that time when the employee or claimant becomes aware, or * * * should have been aware, of the relationship between the employment, the disease, and the death or disability.

"In determining benefits for occupational disease victims, S. 38 again looks to the manifestation date, not the date of last exposure. We recognize that an active worker may become ill before becoming eligible for compensation, as in the case of asbestos-related plaques, without suffering an immediate loss of wages. In those cases, the clock would not begin to run on the notice or filing statutes of limitation, until an actual wage loss was suffered. Nor in general would we look to the wage at the onset of the illness, but rather the wage immediately prior to wage loss in determining benefit levels. * * *

"The conference report also assures that a claimant whose disease manifest itself subsequent to retirement will not be denied benefits. * * *".

Id.

Finally, Senator Hatch made reference to post-retirement *manifestation* in a Senate Report:

"The second issue addressed with respect to occupational disease is whether retirees, or their survivors, should be entitled to compensation where the disease does not manifest itself until after retirement".

130 Cong. Rec. 26,300 (1984).

It therefore appears that Congress intended that the words "occupational disease which does not immediately result in disability or death" mean disease that does not immediately manifest itself. "Manifestation", in turn, is easily defined. It is defined in a medical dictionary as "[i]n medicine, the display or disclosure of characteristic signs or symptoms of an illness".¹¹ A law dictionary defines "manifest" as "[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident."¹² That this concept has been a part of the Act since its inception was underscored by Judge Learned Hand in an early decision construing the LHWCA:

¹¹ *Stedman's Medical Dictionary* 832 (24th ed. 1982).

¹² *Black's Law Dictionary* 867 (5th ed. 1979).

"The statute is not concerned with pathology, but with industrial disability; and a disease is no disease until it manifests itself."

Grain Handling Co. v. Sweeney, 102 F.2d 464 (2d Cir. 1939), cert. den. 308 U.S. 570, 60 S. Ct. 83.

Thus, while the Director may argue that noise causes immediate disability, even the Director would concede that hearing loss does not always become *manifest* until after retirement. The foregoing legislative history lends ample support to the conclusion that the "time of injury" under §910(i) is the time of actual or constructive awareness of employment-related disability for claims involving occupational diseases including those for loss of hearing. This Court should construe the Act so as to carry out the intent of Congress, as evidenced by the statute's language and its legislative history. See, e.g., *Director, OWCP v. Perini North River Associates*, *supra*.

CONCLUSION

In sum, Congress did *not* intend to draw a distinction based upon forensic medicine between claims for diseases that progress as a function of exposure and those that are latent until after retirement. On the contrary, Congress specifically intended that claims for loss of hearing be subject to the "retiree" amendments. This intent is evident from both the statutory language at §908(c)(23) and the legislative history of the 1984 Amendments. To the extent that §910(i) is ambiguous, such ambiguity should be resolved so as to carry out the intent of Congress.

For the foregoing reasons, BIW respectfully requests that the decree issued by the First Circuit be reversed and that the matter be remanded to calculate benefits under §908(c)(23).

Respectfully submitted,

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No. 91-871

Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

**BATH IRON WORKS CORPORATION and
COMMERCIAL UNION INSURANCE COMPANIES,**

Petitioners,

v.

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,**

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

BRIEF FOR RESPONDENT EMPLOYEE

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SUMMARY OF THE ARGUMENT

COMPENSATION FOR HEARING LOSS BENEFITS FOR VOLUNTARY RETIREES UNDER THE LONG-SHORE AND HARBOR WORKERS' COMPENSATION ACT SHOULD PROPERLY BE DETERMINED UNDER 33 U.S.C. 908(c)(13) OF THE LHWCA.

This is a case wherein ambiguity requires interpretation of statutory material. The proper approach, to consider the legislative history and underlying policies to the Act was utilized by the Benefits Review Board in this case. *Director, O.W.C.P., United States Dept. of Labor v. Perini North River Associates*, 459 U.S. 296, 74 L. Ed. 465, 103 S. Ct. 634 (1983).

33 U.S.C. § 908(c)(13) is the proper and the sole basis for calculation of hearing loss benefits under the LHWCA in the case of active and retired workers. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988). Congress did not intend to use 33 U.S.C. § 908(c)(23) to calculate hearing loss benefits. *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989). Review of the legislative history suggests that Congress did not intend for hearing loss claims by retirees to be compensated under § 908(c)(23). 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984).

ARGUMENT

I. THE DECISION OF THE FIRST CIRCUIT AND THE DIRECTOR'S ARGUMENT ARE FLAWED BECAUSE THEIR BASIC PREMISE, THAT HEARING LOSS IS AN OCCUPATIONAL DISEASE WHICH IMMEDIATELY RESULTS IN DISABILITY, IS INCORRECT.

The Director argues that Congress, in enacting the 1984 amendments to the Act, especially 33 U.S.C.

§§ 908(c)(23), 910 (d)(2), 902(10), 912(a), 913(a), and 910(i), intended to supply a comprehensive scheme to compensate those suffering from "long latency occupational diseases." Taking issue with the finding of the Benefits Review Board in *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) and the decisions of the Fifth and Eleventh Circuits in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990) and *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561 (11th Cir. 1991) the Director asserts that occupational noise induced hearing loss is a disease which immediately results in a disability.

The Director correctly notes that if hearing loss were a disease which did not immediately result in disability it would bring into play § 910(i). 33 U.S.C. § 910(i). According to the Director, occupational hearing loss is not a long-latency disease such as asbestosis. On the contrary, says the OWCP, once the employee is removed from the injurious stimulus, intense noise, the disease does not progress. The Director then states that exposure to intense noise **immediately** results in a disability so that hearing loss is not the type of occupational disease described in § 910(i). Indeed, this argument was accepted by the First Circuit. *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 817.

That this line of reasoning does not hold may be seen by a review of the statutory language and the treatise cited by the Director and the First Circuit. As noted above, the basis for the Director's position that § 908(c)(13) rather than § 908(c)(23) applies to this claim is that hearing loss is not a long-latency disease. Though the phrase "long-latency disease" may be a favorite of the

Director and may have been used in the House Report¹ it does not appear in the statute. Instead, the Act in § 908(c)(23) speaks of claims for permanent partial disability in which the average weekly wage is determined under § 910(d)(2). Section 910(d)(2) applies to claims for disability due to occupational disease for which the time of injury is determined under § 910(i). Section 910(i) applies by its plain language only to "disability due to an occupational disease which does not immediately result in . . . disability . . ." and is the legislative device which sets the "date of injury" for the purpose of determining the average weekly wage for such claims.²

In interpreting the statute both the Director and the court below have ignored the Act's definition of "disability", the undisputed medical facts about the development of a noise induced hearing loss, and the undisputed facts about this employee's hearing loss. Hearing loss has long been considered an occupational disease under the Act. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *Machado v. General Dynamics Corp.*, 22 BRBS 176, 179 (1989). Based upon the language used in the statute, though, the inquiry is not whether, as phrased by the Director, it is a "long-latency" disease, but whether in the language of § 910(i) it is a disease which "does not immediately result in . . . disability."

¹ H.R. Rep. No. 98-570, 98th Cong. 1st Sess., part 1, p. 11.

² Under 33 U.S.C. § 910(i) the average weekly wage is the wage the employee is earning when "the . . . claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability."

The definition of "disability" is contained in § 902(10) as follows:

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in § 910(d)(2). 33 U.S.C. § 902(10).

Placing the definition of "disability" from § 902(10) into § 910(i) results in the following:

For the purposes of this section with respect to a claim for compensation for . . . disability . . . due to an occupational disease which does not immediately result in **[incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment]**; or in permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in § 910(d)(2), the time of injury shall be . . .

Whether this claim falls within § 910(i) or not is determined by whether it falls within the disability definition of § 902(10).

First, did this employee's hearing loss, as the Director contends, immediately cause an "incapacity because

of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . " 33 U.S.C. § 902(10). The Act has long been interpreted as requiring actual, not potential, wage loss before the employee is entitled to compensation. Disability under the Act is a hybrid concept with both medical and economic components. It is such incapacity caused by injury which makes an employee actually (not merely potentially) unable to earn the wages he was receiving at the time of his injury. *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). As was stated in *Owens v. Traynor*, 274 F. Supp. 770 (DC Maryland), *aff'd* 396 F.2d 783 (4th Cir. 1967); *cert. den.* 393 U.S. 962, 21 L. Ed. 2d 375, 89 S. Ct. 401 (1968):

. . . a Deputy Commissioner is not required or authorized to make such an award under sec. 908(c)(21) merely because there is some anatomical impairment. Anatomical impairment and industrial disability must be distinguished. Section 902(10) defines 'disability' as an 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment'. As the Second Circuit said in *John W. McGrath Corp. v. Hughes*, 289 F.2d at 405, "This definition clearly imposes upon the Deputy Commissioner and the reviewing courts the duty to evaluate the extent of a claimant's disability in economic rather than medical terms."

The error committed by the First Circuit can be readily discerned when reference is had to 942 F.2d 811, 816-817. There in discussing the applicability of the retiree provisions added by the 1984 amendments (what the Court dubbed "System Three") the court below paraphrased the

language of § 910(d)(2) noting that it applies only where the "disability . . . occurs . . . within the first year after the employee has retired . . . or . . . more than one year after the employee has retired. . . ." The Court then went on to say:

Using ordinary English, however, one would normally say that a worker who becomes deaf before retirement is a worker whose disability "occurs" before retirement not after retirement. Hence the language of Section 910(d)(2) seems not to apply to a worker who becomes deaf at the workplace. 942 F.2d at pp. 816-17.

The Court erred in looking to the "ordinary English" meaning of "occurs" when it should have been ascertaining the statutory definition of the term "disability." Unless there is some "disability" within the statute's definition in the first place, there is no occasion to decide when that "disability" occurs.

As a medical proposition, the Director, citing Sataloff and Sataloff, *Occupational Hearing Loss*, (1987) notes that exposure to intense noise **over many years** can produce a gradual loss of hearing known as occupational deafness.³ Medically then, though the employee may sustain an

³ In fact, one of the defining components of occupational hearing loss is that it must have developed over several years. Sataloff, p. 357.

"injury"⁴ from the very first exposure to intense noise, it will take years for a "disability" to arise if the employee ever actually does sustain a reduction in wage earning capacity. The employee in this case never did sustain any disability in the economic sense and retired from employment in 1972. Decision and Order of ALJ Martin J. Dolan, Jr., Appendix to Petition for Writ of Certiorari, p. 33 (hereafter: Pet. App.).

At some point this employee's hearing loss progressed to the point where, measured under the provisions of § 908(c)(13)(E), the loss became compensable as a

⁴ While a "disability" requires a loss of wage earning capacity, an "injury" does not. Injury is defined in § 902(2):

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment. 33 U.S.C. § 902(2).

Under this definition it has been held that an injury takes place "when it becomes clinically evident, that is, when it becomes reasonably capable of medical diagnosis." *Eagle Picher Industries*, 682 F.2d 12, 25 (1st Cir. 1982); when "something unexpectedly goes wrong within the human frame . . .", *Johnson v. Brady-Hamilton Stevedoring Co.*, 11 BRBS 427, 430 (1979), see also *Romeike v. Kaiser Shipyards and SAIF Corp.*, 22 BRBS 491 (1986). Congress intended that "injury" and "disability" are separate concepts. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 72 S. Ct. 223, 96 L. Ed. 225 (1952). Noting the different definitions contained in the statute, the *Pillsbury* court held: "Congress knew the difference between 'disability' and 'injury' and used the words advisedly." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 96 L. Ed. 225, 229.

scheduled award.⁵ The listing of an injury in the schedule conclusively establishes a loss of wage earning capacity. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144 (2d Cir. 1955).⁶ In this particular case, the first evidence of any statutory "disability" suffered by Mr. Brown, (either actual or presumed) is an audiogram administered in 1954, some 15 years after he had started work for the employer. Petition App. p. 33.

Is the Director correct that there is an immediate disability if the second portion of the definition is used? That is, does hearing loss immediately result in "permanent impairment" under the guides promulgated by the American Medical Association? Again the answer is in the negative. Both the second (1984) and third (1988)

⁵ The Act provides three systems for compensating workers suffering from a work related partial disability. *Bath Iron Works Corporation v. Director, OWCP*, 942 F.2d 811 (1st Cir. 1992). Compensation for hearing loss is included under what the court below referred to as "system one" contained in § 8(c)(1-20), 33 U.S.C. § 908(c)(1-20). That section is often called "the schedule" and the afflictions enumerated therein are often referred to "scheduled injuries." *Bath Iron Works Corp., supra.*, 942 F.2d 811, 812. Loss of hearing is, and always has been, the only occupational disease listed in the schedule. 44 Stat. 1427 (ch 509, March 4, 1927).

⁶ " . . . Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity; in contrast, even though a scheduled injury may have no effect on an employee's capacity to perform a particular job or to maintain a prior level of income, compensation in the schedule amount must be paid." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282-283, 66 L. Ed. 446, 457, 101 S. Ct. 509 (hereafter, *Pepco*).

editions of the *Guides to the Evaluation of Permanent Impairment* promulgated by the AMA require that the hearing loss suffered by an individual must have progressed to an average loss of at least 25dB in the appropriate frequencies before any permanent impairment is assigned to that loss. Second Ed. p. 154 para. 7; Third Ed. p. 166 para. 7. So again, though there may be an injury to the claimant as soon as he shows a measurable hearing loss by audiogram, there is no statutorily defined permanent impairment until the loss progresses over time to the required threshold.

The position advocated by the Director, and adopted by the First Circuit is not supported by the statutory language, by the medical facts set forth in the treatise which they cite, by the case law, by the AMA guides, or by the facts as found by the administrative law judge in this case. The occupational disease of hearing loss, as opposed to a sudden traumatic loss of hearing, simply does not result in an immediate disability in any case, and did not so result in the case of employee Ernest Brown. Though, as the Director states, the full extent of the employee's hearing loss is fixed on the date of retirement (because removal from the injurious stimuli ends the progression of the hearing loss) this does not mean conversely, that any disability resulted immediately from the first exposure. Nor does it mean, as the Director simply asserts without statutory citation, that the time of injury is the date of last exposure to injurious noise.⁷

⁷ In fact, as noted in the next several paragraphs, this "last exposure" argument has been rejected by the Fifth, Ninth, and Eleventh Circuits. See: *Ingalls Shipbuilding, Inc. v. Director*, (Continued on following page)

II. THE STATE OF THE LAW PRIOR TO THE 1984 AMENDMENTS

In determining how Congress intended to affect claims for loss of hearing through the 1984 amendments to the Act, one must first ascertain the fashion in which such claims were dealt with prior to those amendments.

Prior to the 1972 amendments to the Act⁸ if a working employee filed a hearing loss claim his date of injury for filing notice under § 912 and for filing a claim under § 913 was the date of manifestation of his injury; the same date was used for determining his average weekly wage under § 910. *Travellers Insurance Co. v. Cardillo*, 225 F.2d 137, 143 (2nd Cir. 1955).⁹

(Continued from previous page)

OWCP, 898 F.2d 1088, 1092 (5th Cir. 1990); *Todd Shipyards, Corp. v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983); *Alabama Drydock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1567 (11th Cir. 1991). Further, the legislative history clearly shows that Congress rejected "last exposure" as the time of injury when it enacted the 1984 amendments: "The conferees specifically reject the date of last exposure to the injurious substance as the time of injury for determination of pay purposes." H. Rep. 98-1027, 98th Cong., 2nd Sess. pp. 29-30.

The Board itself abandoned this approach after the decision of the Ninth Circuit in *Todd*, *supra*, see *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989).

⁸ Enacted as P. L. 92-576, § 1, 86 Stat. 1251.

⁹ Quoting this Court's opinion in *Urie v. Thompson*, 337 U.S. 163, 170, 69 S. Ct. 1018, 1025, 93 L. Ed. 1282 (1949) the Second Circuit held that "an employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves."

In 1972 §§ 912 and 913 were amended to assure that time for notice and filing did not start until the employee was aware of the connection between the work and the injury. 86 Stat. § 922. Nothing, however, was done to amend § 910 regarding the date of injury for selecting the appropriate average weekly wage upon which to base the injured employee's compensation. Under BRB decisions prior to *Dunn v. Todd Shipyards Corp.* 13 BRBS 647 (1981) the date of injury for the purpose of calculating the average weekly wage had consistently been held to be the date of manifestation of the disease. See *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983). In *Dunn*, *supra*, the Board held that the date of injury for average weekly wage calculations should be the date of the claimant's last exposure to the injurious substance. Reversing prior decisions, the Board in *Dunn* held that rather than receiving compensation based on the wage earned in 1975 (the date of manifestation of the disease) compensation should have been based on the wage earned in 1945 (the date that the employee was last exposed to the asbestos which caused his occupational disease). *Dunn*, *supra*, 13 BRBS at pp. 649-650. When the case reached the Ninth Circuit, however, this approach was rejected as "ill-considered and contrary to the express provisions of the LHWCA . . ." *Todd Shipyards*, *supra* p. 1289; see also fn. 6.

Based upon the above cited authorities it appears that until the Board's decision in *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984) a retiree filing a hearing loss claim, would have had his date of injury for notice and filing purposes (§§ 912 and 13) and for average weekly wage (§ 910) all based on the time of manifestation of the injury. Since hearing loss is a scheduled award, no actual

impairment to earning capacity would have to be proven in order for the claimant to recover. *Travellers Insurance Co. v. Cardillo*, *supra*; *Pepco*. The claimant's wage would then be determined under the 1972 version of § 910 a-c.¹⁰

On March 20, 1984 the BRB rendered its decision in *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984) a case which involved a claim for loss of hearing by a retired worker.¹¹ The Administrative Law Judge rejected the employer's argument that claimant's retirement made him ineligible for benefits, stating that the scheduled awards are conclusive presumptions of a loss of wage earning capacity and cannot be rebutted. *Redick*, *supra* at p. 156. The BRB, citing its then very recent decision in *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984), held that because the disease had become manifest

¹⁰ 33 U.S.C. § 910 (Determination of Pay) as it existed prior to the 1984 amendments provided two basic methods of calculating the employee's average weekly wage as of the date of injury (§§ 910(a) and (b)) and contained a catchall provision for cases not covered by the first two subsections.

Section 910(a) dealt with the employee who had worked in the employment in which he was injured during substantially the whole of the year preceding the injury. Section 910 (b) provided the calculation for the employee who had not worked in such employment during substantially the whole of the year preceding the injury. Section 910(c) applied if either of the foregoing methods could " . . . not reasonably and fairly be applied . . . "

¹¹ So far as counsel for the claimant can ascertain it is the only reported case under the Act up to that time which involved a claim for hearing loss by a retired worker.

subsequent to claimant's voluntary retirement from the work force there could be no loss of wage earning capacity as a result of the condition and thus there could be no award of benefits.¹²

Even the Board has at least tacitly acknowledged that the decision in *Redick*, was wrong. Without specific reference to the earlier case it noted in *Machado v. General Dynamics Corp.*, 22 BRBS 176, 180 (1989) that:

Prior to the 1984 Amendments permanent partial disability in all cases involving occupational diseases not covered by the schedule [§ 8(c)(1)-(20)], such as respiratory impairment,

¹² *Aduddell* involved a claim for permanent total disability under § 908(a) and not a claim for a scheduled injury. Reasoning that (1) claimant's time of injury was post-retirement when he was not earning any wages and (2) that the Act provides compensation for disability defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment" the Board held that:

Under these facts, while it is conceded that the claimant now suffers from asbestosis, claimant has not established that he sustained a loss of wage earning capacity as a result of this injury and no such loss can be reasonably anticipated in the future. Consequently there is no entitlement to compensation under the Act. *Aduddell*, 16 BRBS at p. 133.

Though this may have been a proper holding in the factual situation which faced the Board in that case, i.e. a claim for benefits under § 908(a), it was plainly error to apply this logic to Mr. Redick whose claim for a scheduled injury under this Court's decision in *Pepco* and the Second Circuit's decision in *Travellers Insurance Co. v. Cardillo* did not require any proof of loss of earning capacity or wages.

was determined under Section 8(c)(21), 33 U.S.C. § 908(c)(21), and employees suffering such disabilities had to prove a loss in wage earning capacity in order to be compensated. Permanent partial disability for hearing loss, however, has been compensated exclusively under the schedule, 33 U.S.C. § 908(c)(13), and thus for these disabilities, loss in wage earning capacity is presumed.

This language is directly contrary to the Board's own holding in *Redick*.

Thus when Congress was formulating the 1984 amendments, hearing loss claims, whether for active or retired workers, could have been handled within the existing case law and statutory structure. The evils sought to be remedied by the occupational disease amendments were not applicable to claims for loss of hearing in the first place.

III. THE BOARD'S INTERPRETATION OF THE ACT BEST TAKES INTO ACCOUNT THE TREATMENT OF HEARING LOSS CASES BEFORE THE 1984 AMENDMENTS, THE INTENT OF CONGRESS IN ENACTING THOSE AMENDMENTS, AND THE LANGUAGE OF THE AMENDMENTS

A. Statutory Construction

The Board has properly resorted to legislative history and utilized accepted rules of construction in considering Congressional intent in cases involving retirees with hearing loss. It is true that the clear language of the Act is the most reliable index of its meaning, but it is also true

that the surest way to misinterpret a statute or rule is to follow its literal language without reference to its purpose. *Viacom International Inc. v. Federal Communications Commission*, 672 F.2d 1034, 1040 (2d Cir. 1982) (citations omitted). Even when the language of the statute to be interpreted appears to be clear on its face, it may be proper to consider congressional intent to ascertain the scope and extent intended. *Director, O.W.C.P., United States Dept. of Labor v. Perini North River Associates*, 459 U.S. 296, 74 L. Ed. 2d 465, 103 S. Ct. 634 (1983).

In *Tidewater Oil Co. v. U.S.*, 409 U.S. 151, 34 L. Ed. 2d 375, 93 S. Ct. 408 (1972) the Court was faced with the interpretation of 28 U.S.C. 1292(b) relating to certain interlocutory appeals. After noting the clarity of the statute and various amendments to it, it held, however, that while the clear meaning of statutory language is not to be ignored: "Words are inexact tools at best (citations omitted) and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history." *Tidewater, supra*, 409 U.S. at 157, 34 L. Ed. 2d at 382-383.

In *Director, OWCP, v. Perini North River Associates*, 459 U.S. 279, 74 L. Ed. 2d 465, 103 S. Ct. 634 (1983) the Supreme Court was faced with the issue of whether the 1972 amendments to the coverage afforded by the Act eliminated from coverage a class of employees which would plainly have been covered under the prior version of the statute. Churchill, the claimant, had been injured over the actual navigable waters of a river while working as a construction worker during the building of a sewage treatment plant. It did not appear that his employment fit the 1972 amendments' "status" requirement that the

employee be engaged "in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker, including a shiprepairman, shipbuilder, and shipbreaker . . . " 33 U.S.C. § 902(3).

The dissent (Stevens, J.), like the employer in this case, found the matter very simple:

"If we ignore history and merely concentrate on the text of this statute, the conclusion is inescapable that it merely provides coverage for people who do the work of longshoremen and harborworkers – amphibious persons who are directly involved in moving freight onto and off ships, or in building, repairing, or destroying ships." *Perini, supra*, 459 U.S. 297, 328, 74 L. Ed. 2d 465, 487, 103 S. Ct. 634.

The majority, however, found "the question of Churchill's coverage is an issue of statutory construction and legislative intent." *Perini, supra*, 459 U.S. 297, 305, 74 L. Ed. 2d 465, 473, 103 S. Ct. 634. Noting that it has long held that the Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results, the court reviewed the decisions construing the pre-amendment statute and the legislative history of the amendments themselves with the result that the employee was found to be covered.

Even in *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990) where the Fifth Circuit held that retirees with hearing loss should be compensated under § 908(c)(23), the court reviewed the legislative history and the purpose behind the 1984 amendments in formulating its decision.

It is important to remember that when interpreting the Longshore and Harbor Workers' Compensation Act:

" . . . it is a well settled principle that the Act is to be construed liberally, in order to avoid harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88 (1953). It is an established and accepted policy that worker compensation statutes are to be liberally construed. This court must be guided by the special social policies that this statutory framework is designed to achieve:

(T)o relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediate to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they are enacted and if possible to avoid incongruous or harsh results.

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414, 52 S. Ct. 187 (1932).

B. Claimants agree with the results reached by the Board in determining hearing loss benefits for retirees under Section 8(c)(13) of the LHWCA.

Section 8(c)(13) of the LHWCA provides that compensation for a loss of hearing in both ears shall be paid for a period of two hundred weeks. For a partial loss of hearing the degree of loss is proportionately applied to the number of weeks in the schedule. 33 U.S.C. § 908(c)(19). Pursuant to § 908(c)(13) a claimant is entitled to receive the full two-thirds of his average weekly wage for the proportionate number of weeks. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983) *aff'd in relevant part*, 751 F.2d 1460, 1464 n. 5, 17 BRBS 29, 32 n. 5 (CRT) (5th

Cir. 1985), *aff'd on reconsideration en banc*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986).

Simply stated, the issue before this Court is whether the Board properly applied § 908(c)(13) in calculating the duration of and compensation for an industrially related hearing loss sustained by the retired claimant. Under the provisions of § 908(c)(13) the claimant received 164.8 weeks of benefits (82.4% of 200 weeks for binaural hearing loss) at a compensation rate of \$193.22 (66 2/3 per cent of the national average weekly wage of \$289.83) for total compensation of \$31,842.66. Pet. App. p.11. Claimant was 68 years old at the time of the hearing in 1988. Had he been compensated under the terms of § 908(c)(23) he would have begun receiving \$56.03 per week and would receive that amount until the date of his death because the hearing impairment is permanent. (Under the *Guides to the Evaluation of Permanent Impairment* 2nd ed. mandated by § 902(10) the 82.4% binaural hearing loss converts to a 29% permanent impairment to the whole person and thus into weekly compensation of \$56.03. See *Guides, supra*, p. 158 Table 4).

Employer argues and the Fifth Circuit in *Ingalls Shipbuilding, supra*, found, that the plain language of § 908(c)(23) and § 910(d)(2), precludes application of § 908(c)(13) in a case where the claimant is a retiree at the time he learns of his noise-induced occupational hearing loss. Section 908(c)(23) reads as follows:

Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this

title, the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

Pursuant to § 908(c)(23) then, the impairment rating is applied to a percentage of a claimant's average weekly wage to determine the compensation rate, which is to be paid to the claimant for the duration of his impairment. In contrast, § 908(c)(13) utilizes the impairment rating to determine the number of weeks of compensation for the loss. Compensation is paid for the calculated term at the full compensation rate.

Bath Iron Works urges that § 908(c)(23) automatically applies because of the language identifying the relevant claims as those in which the average weekly wages are determined under § 910(d)(2) of the Act. Section 910(d)(2) specifies the average weekly wage to be employed in claims for death or disability due to an occupational disease for which the time of injury occurs post-retirement.

The Board rejected Employer's argument by distinguishing hearing loss from other occupational diseases. *Fairley v. Ingalls Shipbuilding Inc.*, 22 BRBS 184 (1989), *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989). The Board stated that the 1984 amendment implemented by § 908(c)(23) was meant to provide a remedy for retirees suffering from permanent partial disability in cases of occupational diseases not covered by the schedule, such as respiratory ailments. *Id.*, at 22 BRBS 187. Because respiratory impairments were compensated

solely under § 908(c)(21) unlike an injury such as hearing loss specifically identified in the schedule provisions of §§ 908(c)(1)-(20), prior to the 1984 amendments an employee suffering from this type of occupational disease had to prove a loss of wage earning capacity to establish entitlement to compensation. *Id.*, 22 BRBS at 187. Accordingly, the Board had previously denied benefits to a claimant suffering from asbestosis who voluntarily retired from the work force for reasons unrelated to his occupational disease because he could not show a wage loss resulting from his disability. *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984), fn 12. Review of the legislative history of the 1984 amendments reveals that Congress expressly intended to overrule *Aduddell* by legislatively expanding the category of eligible claimants to include those workers who discover the existence of their occupational diseases subsequent to their retirement when they are unable to prove a wage loss resulting from injury. H. Rep. 98-1027, 98th Cong., 2d Sess. p. 30.

The Board noted in *Fairley*, *supra*, and *Machado*, *supra*, that § 908(c)(23) if strictly interpreted could be applied to compensate retirees with a hearing loss. *Id.*, 22 BRBS at 187. However, the Board stated that hearing loss claims have "historically been compensated in a different manner from unscheduled occupational diseases", *Fairley*, 22 BRBS at 187, and that such an interpretation of the statute would contravene the exclusivity of the schedule. *Id.*, 22 BRBS at 187. The Board cited this Court's decision in *Pepco* for the proposition that since a hearing loss is contained in the schedule found at §§ 908(c)(1)-(20), recovery for such an injury is restricted to a specific number of weeks, and that it would be incongruous to

treat voluntary retirees with a hearing loss differently from all other employees covered by § 908(c)(13).

Additionally, the *Fairley* decision listed other considerations for approving a scheduled award, stating that such an award provides a readily calculable amount of compensation, promotes swift claim resolution and administrative efficiency. *Id.*, 22 BRBS at 188.

Employer contends that the Board disregarded the express language of § 908(c)(23) in concluding that retirees could be compensated for hearing loss under § 908(c)(13). However, a literal application of statutory language is inappropriate if it would produce a result that conflicts with the legislative purpose clearly manifested in an entire statute or with clear legislative history. *Almendarez v. Barret-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) (citing *United Steelworkers v. Weber*, 443 U.S. 193, 201, 61 L. Ed. 2d 480, 99 S. Ct. 2721, 2726 (1979)).

C. The House amendments treated hearing loss claims separately from other occupational disease claims.

As noted above, the Board based its position in part on the differing treatment accorded hearing loss claims in terms of how they have historically been compensated, i.e., as the only scheduled occupational disease. A review of the legislative history of the 1984 amendments reveals the efforts of Congress to remove obstacles to the filing of claims and to fairly compensate both hearing loss and other occupational diseases. It shows a continuing debate on the issue of whether hearing loss is to be lumped

together with other occupational diseases for some or all purposes under the Act.

H. Rep. 98-570, 98th Cong., 1st Sess. part 1 (1984) contains separate explanatory sections dealing with hearing loss (pp. 9-10) and occupational disease (pp. 10-12).

The House gave presumptive effect to an audiogram if it met certain criteria for reliability including the requirement that the audiogram be accompanied by a report which is provided to the employee. One of the purposes of the report was to alert the employee to the possibility of filing a claim against the current or former employer.

Due to the presumptive quality accorded the audiogram as to the extent of the hearing loss, the House Committee also mandated that the time for giving notice of a claim under 33 U.S.C. § 912(a) and for filing a claim under 33 U.S.C. § 913 would not begin to run until the employee received a copy of the audiogram and the report. H. Rep. 98-570, p. 10.

Nothing in the explanatory text of the report referring specifically to hearing loss discusses which section of the Act controls for the purposes of determining the amount of the average weekly wage in such claims.

The House was also concerned with the "procedural hurdles" encountered by victims of "long latency occupational diseases" and sought to insure that these disease victims received compensation which was adequate to their current needs. H. Rep. 98-570, p. 10. Noting unspecified "decisional law" concerning the notice and statute of limitations provisions (§§ 912 and 913), the

report shows that the House was concerned largely with hurdles placed by the notice and filing provisions in the path of those suffering from long latency occupational diseases. As an answer the House proposed to eliminate completely the requirement of notice in such cases. To that end the bill as enacted by the House amended § 912(a) to read as follows:

Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the injury or death and the employment, **except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall not be required . . .** H. Rep. 98-570, p. 52 (emphasis added).

Since the House had already in § 908(c)(13)(ii) mandated that notice must be filed in cases of occupational hearing loss, the obvious intent was to distinguish such cases from other types of occupational diseases for notice purposes. Given the House provision that the notice period did not begin to run until the employee received an audiogram and explanatory report this is understandable. Those two documents would alert the worker to the need to give notice to the employer.

In addition it specifically required in § 908(c)(13)(ii) that a claim for hearing loss must be filed within one year after the employee had received an audiogram and report. Again hearing loss was treated differently from

other occupational diseases. For other diseases amended § 913 mandated that the claim must be filed within one year after the disease has impaired the claimant's earning capacity or has resulted in a diminution of wages and the employee becomes aware or should have become aware of the connection between the employment, the disease and the disability. H. Rep. 98-570, p. 53.

What did the House intend then with respect to the calculation of the average weekly wage in hearing loss and other occupational disease cases; was the same date to be used? The amendments to § 908(c)(13) which dealt specifically with hearing loss and which set the time of injury for the purposes of giving notice and filing claims are silent on the question of the time of injury for the calculation of the rate of pay (H. Rep. 98-570, p. 43). The explanatory text which discusses those amendments is also silent (pp. 9-10, 27).

The House amended § 910 to deal with the calculation of the weekly wage in occupational disease cases. By adding a new sub-section (e) the bill provided that the date of injury in such cases was the date of onset of the disabling condition. H. Rep. 98-570, p. 50. The explanatory text (p. 12) notes the desire of the House to assure that compensation for an occupational disease should be "reasonable to the needs of the victim . . ." and specifically rejected the holding of the BRB in *Dunn v. Todd Shipyards*, 13 BRBS 647. In *Dunn*, the Board had held that the date of injury in an occupational disease case under § 910 of the Act should be deemed to be the date of last exposure to the injurious stimuli which caused the disease. *Dunn, supra*, p. 649. Benefits were awarded to the widow of a deceased worker whose asbestosis became

disabling in 1975 based upon the wage he was making in 1945, the date he was last exposed to asbestos fibers.

Obviously determined to see that occupational disease claimants received some "reasonable" amount of compensation, the House provided in amended § 910(e) that the "date of onset of the disabling condition" is the time of injury for setting compensation. H. Rep. 98-570, p. 50. Since occupational diseases may take a long time to develop, the House recognized that the employee might no longer be working in covered employment, or be working only part-time, or that he might no longer be employed at all. To deal with those situations it mandated that the wage earned immediately before the onset of the disabling condition be used. H. Rep. 98-570, p. 12. Further, it set a floor for the wage at the National Average Weekly Wage as determined by the Secretary of Labor under § 906(b). H. Rep. 98-570, pp. 12, 50.

The House was not consistent in its references to occupational disease; for instance, in its amendments to § 912 and § 913 regarding notice and filing deadlines it referenced occupational disease "which does not immediately result" in a disability or death, while in setting out the appropriate date for compensation purposes it simply referred to "occupational disease" without that qualifier. It is clear that the House had a specific meaning in mind for the phrase: "disease which does not immediately result in death or disability." At page 11 of the H. Rep. 98-570 the phrase is defined:

By this, the Committee means to describe disabling conditions which do not develop immediately after the initial change in the body of the

worker resulting from exposure to a toxic substance or harmful physical agent, or which do not even result in a change in the body immediately after the exposure to the causative toxic substance or harmful physical agent.

Having referenced *Dunn v. Todd Shipyards, supra*, the House was aware from the Board's discussion of occupational diseases in that case (see 13 BRBS 647, at pp. 652-653) that there are at least three categories of occupational diseases based on the concept of latency periods. There are those which have virtually no latency period and are thus similar to traumatic injuries (exposure to certain insecticides and hydrocarbon solvents were cited as belonging to this category); there are those such as asbestosis with latency periods of up to fifty years; and there are those such as hearing loss which become progressively worse with increased exposure to the harmful stimuli. Though the ultimate holding of *Dunn* as to the date of injury was rejected by the House, it appears that it recognized the various categories of occupational disease for it singled out long latency occupational disease for special treatment regarding notice and filing, singled out hearing loss for special treatment in the same area, and then, concerned that victims of all occupational diseases receive adequate compensation, mandated in § 910 that wages be calculated as of the date of onset of the disabling condition and in no event be based on a wage less than the National Average Weekly Wage. Also, no specific mention is made in the House Report of concern with "retirees", but only of those who for any reason might be employed in other than covered employment under the Act, or in part time employment, or unemployed at the time of onset of the disability.

Before the bill went to Conference then, the House had singled out hearing loss for specific treatment in § 912 and § 913 regarding notice and statute of limitations. It left hearing loss as the only occupational disease compensated without evidence of lost earning capacity. Whether the House intended to treat hearing loss cases the same for the purposes of calculating the average weekly wage is not at all clear. Section 910(e) calls for the wage to be that earned at the time of the onset of the disabling condition as calculated in accordance with § 910(a)-(d). This approach could be applied to those suffering from hearing loss, but the explanatory text states that:

Under the provisions of the new section 10(e), disability benefits for a worker who is found to be disabled as a result of an occupational disease would be expressed as the appropriate percentage of the worker's last wage prior to the onset of the disability, or (in cases of a worker who was not employed, or not employed full-time immediately prior to the onset of the disability) the appropriate percentage of the National Average Weekly wage on the date of onset of the disability, whichever was the greater amount . . . H. Rep. 98-570, p. 12.

Since hearing loss was compensated pursuant to the schedule in § 908(c), however, an award is based not on a percentage of the average weekly wage but is based on the full compensation rate for a specified number of weeks.¹³ In the event of a partial loss, the employee

¹³ In the case of total loss of hearing the claimant is entitled to 200 weeks of compensation. 33 U.S.C. § 908(c)(13).

receives an award for a proportionate number of weeks under § 908(c)(19), *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 813.

If the House did not intend to apply § 910(e) to hearing loss cases it could have meant to leave in place those decisions such as *Travelers Insurance v. Cardillo* which held the average weekly wage to be that in effect at the time of manifestation of the disease.

D. The Conference Committee continued the separate treatment of hearing loss and other occupational diseases for the purposes of compensation.

The Conferees' bill made one change specifically affecting the manner in which hearing loss cases were to be compensated. H. Rep. 98-1027, 98 Cong. 2 Sess., pp. 27-28. Under the Board's decision in *Princ v. Todd Shipyards Corp.*, 12 BRBS 190 (1980) a claimant with a 63% hearing loss was hired by the employer. The loss progressed during employment to a 91% loss. Section 908(f) allows the employer to shift some of the compensation burden to the Special Fund created by the Act when a work related permanent partial disability results from a combination of pre-employment disability and work related disability. Interpreting the previous version of that section the Board in *Princ* held the employer liable for 104 weeks of compensation rather than the 56 weeks which represented the percentage of loss which it had

actually caused.¹⁴ The statute at that time required the employer to pay the amount of the loss attributable to the employment or to pay 104 weeks "whichever is the greater." Noting this holding, the Conferees amended § 908(f) in a manner that applied only to hearing loss cases "within the provisions of section 8(c)(13)" to provide that in such cases only, the employer shall pay the loss attributable to the employment or 104 weeks whichever is smaller.

With respect, then, to the source of compensation in hearing loss cases the 1984 amendments singled out hearing loss for special treatment, indicating that Congress intended to compensate hearing loss claimants differently from other occupational disease victims. See concurring opinion, Brown, AAJ at pp. 182-183, *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989). If Congress had attempted to rectify an inequity which required employers to pay more than their "share" in hearing loss cases, why did it restrict the benefits of the amendment only to claims compensable under § 908(c)(13)? If retired hearing loss claimants are to be compensated under § 908(c)(23) which provides for a percentage of the average weekly wage to be paid for the duration of the impairment, then every case will result in the employer paying the maximum of 104 weeks of compensation. Since hearing loss is permanent the impairment lasts for the worker's lifetime; the only eventuality which saves the employer from paying the entire 104 weeks is the

¹⁴ Total deafness is compensated by 200 weeks of compensation so the proportion represented by the 28% loss attributable to employment was 56 weeks.

employee's death before the expiration of the two year period.

The comments of Senator Hatch in the conference report on the amendments reflect that occupational disease claims were a topic of special concern. Noting that the LHWCA had been interpreted in certain instances to frustrate the purposes of the statute, Senator Hatch related that the amendments relative to occupational disease were designed to compensate the claimants in a fair, adequate and expeditious manner. 130 Cong. Rec. S11624 (daily ed. Sept. 20, 1984).

As previously stated the amendments were drafted to assure that a retiree with an occupational disease which became manifest after retirement would not be denied benefits in recognition of the fact that a retired claimant is just as disabled and in need of financial support as an active worker. 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984). Congress legislatively overruled *Aduddell, supra*, and *Worrell v. Newport News Shipbuilding and Dry Dock, Co. (ALJ)*, 16 BRBS 216 (1984), which denied benefits to retirees, and *Dunn v. Todd Shipyards*, 13 BRBS 647 (1981) which set compensation at outrageously low rates by modifying the definition of disability in § 902(10), 33 U.S.C. § 902(10), for retirees to mean permanent impairment of bodily function and capacity, thereby obviating the need for a retiree to demonstrate a wage loss to prove entitlement to compensation. 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984). Because a retiree has no wages on which to base compensation, the amendments to § 910 of the Act establish a wage based either on actual past earnings of the retiree if the time of injury occurs less than one year after retirement or the national average

weekly wage at the time of manifestation if the disability is discovered more than one year after retirement. 33 U.S.C. § 910(d)(2).

The Conference version of the bill probably provided more generous benefits to retirees than the House version. The latter called for the wage of an unemployed worker to be the National Average Weekly Wage at the time of onset of the disability. The version enacted into law as § 910(d)(2) called for the wage for retirees to be the employee's actual wage at the time of retirement if the date of injury occurred within one year of the date of retirement otherwise it would be the National Average Weekly Wage. In most cases the workers' actual wage would be far higher.

In the Senate, Senator Hatch discussed the intent of the Conferees with respect to retirees afflicted with occupational disease. In doing so he referred to *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984) as one of a number of cases involving retirees with occupational disease who had been denied benefits (the others were *Aduddell*, and *Worrell, supra*). In *Redick*, the Board had denied compensation to a retiree with a hearing loss (see fn. 12) because he was retired at the time of the injury and thus suffered no loss of earnings or earning capacity. The employer has cited that reference as evidence concerning the intent of Congress to include retiree hearing loss claims within the "retiree amendments." Employer's Brief, p. 15. Senator Hatch's remarks are the only mention of *Redick* in the legislative history (Representative Miller in the House debate did not cite *Redick* as one of the cases

which the amendments were designed to overrule). 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984)).

Senator Hatch stated that the Conferees felt that these cases "did not represent equitable policy" in that one's eligibility for compensation should not depend on the fortuity of when he becomes disabled. That does not mean conversely that the bill was intended to lump hearing loss together with other occupational disease for the purpose of computing the amount of compensation, especially in light of the historical differences in the method of compensating hearing loss claims under the schedule.

Occupational diseases also received special treatment in discovery, notice and filing provisions. Section 10 was amended to establish the time of injury as the date of a claimant's actual awareness of the relationship between his employment and the disease or the date he should have been aware by exercise of reasonable diligence or reason of medical advice. 33 U.S.C. § 910(i). The notice-filing period was extended to one year and the claim-filing period to two years from the time of injury in recognition of the subtleties of occupational disease and the difficulties of linking a disease to a particular job or substance in the distant past. 33 U.S.C. § 910(a); § 913(b)(2); 130 Cong. Rec. H9730, H9731 (daily ed. Sept. 18, 1984). Congress continued, however, the differentiation between hearing loss and other occupational disease by retaining the House requirement that hearing loss sufferers first receive an audiogram and report before the time periods begin to run. 33 U.S.C. § 908(c)(13)(D).

Relative to occupational hearing loss claims, Congress also passed extensive legislation amending § 908(c)(13). Section 8(c)(13) now requires that determinations of the extent of hearing loss be based on AMA guidelines, clarifies the evidentiary value of audiograms and mandates that the statute of limitations shall not begin to run until the employee is given a copy of an audiogram with an accompanying report.

Claimants urge that the extensive amendments to § 908(c)(13) are the best indicia of congressional intent to treat hearing loss claims separately from other occupational diseases, regardless of whether or not the claimant is a voluntary retiree. Unlike other occupational diseases, which must be dealt with under § 908(c)(21), hearing loss claims have their own provisions for rating the extent of disability and designating the time of injury for compensation and notice and filing without reference to the amendments contained in §§ 902(10) and 910(i). Surely Congress did not intend to be needlessly repetitive but rather intended that hearing loss claims be treated exclusively in the schedule.

There is no justification for treating a claimant who has sustained an occupational hearing loss differently on the basis of whether or not he is a retiree. Pursuant to § 908(c)(13) the extent of impairment for both worker and retiree must be based on AMA Guides, each must receive a copy of an audiogram and report to determine the time of injury and commence the running of the prescriptive period, and neither need show an actual loss of wages to be entitled to benefits.

The lack of requirement to show actual harm to wage earning capacity is especially noteworthy, and was discussed in detail in *Pepco*. The Supreme Court stated that inasmuch as a loss of wage earning capacity is presumed in claims arising under the schedule, economic factors are not considered. *Pepco, supra*, 449 U.S. at 277, 283, 66 L. Ed. 2d at 453-454, 457, 101 S. Ct. at 514, 517; *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 143-144 (2d Cir.), cert. denied, 350 U.S. 913, 76 S. Ct. 196, 100 L. Ed. 800 (1955).

Other considerations further support the Board's application of § 908(c)(13) in the instant case. A hearing loss is limited in effect to the injured part of the body, whereas other occupational illnesses such as asbestosis may extend in effect to other parts of the body.

Once the worker is removed from or protected from the injurious stimuli the measurable disability due to harmful levels of noise exposure will not increase. R. T. Sataloff and J. Sataloff, *Occupational Hearing Loss*, 357 (1987). This is not the case with the more common types of occupational disease being compensated under the LHWCA today, such as mesothelioma, silicosis, or other types of occupational respiratory diseases. These types of occupational diseases will often and most commonly not appear until after the worker has retired. Once the latency period is over, they will manifest with some form of impairment, usually low at first, but growing steadily, often resulting in the death of the retired worker.

In fashioning a remedy for this type of occupational disease Congress needed a flexible approach that would result in a fair and predictable method of calculation of

benefits which would keep pace with the growing disability. The above considerations are not present with hearing loss claims. The bulk of the loss and impairment will occur, often imperceptibly, but gradually over first ten years of exposure. The impairment is established while the worker is still in the labor force. Once the worker is removed the noise related impairment ceases to grow; it is fixed for all time. Work related hearing loss will not have the same type of pathology on the worker's general health as the other types of occupational disease. The worker will not have the same need for a flexible rule to escalate compensation with the growing level of disability. The retired worker will not be subject to a dynamic pathology that will have a continuing effect on his or her health.

Congress sought to set up a comprehensive approach to calculation of compensation for these types of occupational diseases. The formula established for retirees is premised on the concept of disability since retirees no longer have a wage earning capacity. Section 902(10). By using the disability formula in § 908(c)(23) the compensation rate is keyed to the worker's last wage or the national rate set by the Secretary and to the overall disability of the worker. As disability increases so does entitlement to benefits. This view can be seen in the Senate Report:

The effect of Aduddell and Worrell (both involving occupational diseases from exposure to asbestos) (explanation provided), . . . , is to deny to employees and their survivors part of the

benefit of the bargain . . . The conference substitute . . . makes express provision for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease. It should be noted . . . that the type of benefits paid to a retiree whose disease manifests itself during retirement will be considered a species of permanent partial disability . . . This impairment will be evaluated under the guidelines of the AMA. It should be noted that by being considered a form of permanent partial disability, a retiree's impairment cannot legally ripen into a permanent total disability for the purposes of the act. 130 Cong. Rec. S11625 (daily ed. Sept. 20, 1984).

The above language reflects that Congress had searched for a more flexible method to calculate and administer claims that are not static, as in the case of hearing loss. The comments continue in a vein that indicates a claim for occupational disease benefits under § 908(c)(23) may ripen into a claim for death benefits. In contrast, a hearing loss will never be a species of occupational disease that will result in death of the Claimant.

To compensate retiree hearing loss claimants under § 908(c)(23) as argued by Employer makes no economic sense. The proper application for § 908(c)(23) only emerges when considering occupational diseases that have a gradually increasing deleterious effect on the health of the claimant as a whole. It is only then that the formula set out in this section begins to make economic sense, that is, providing a fair and realistic basis from which compensation can be set when faced with conditions that will continue to grow worse and affect the health of a claimant generally.

In cases of scheduled permanent partial disabilities, if a claimant dies from causes unrelated to the injury, the total amount of the award unpaid at the time of his death is payable under § 908(d)(1) of the Act. 33 U.S.C. § 908(d)(1). If Section § 908(c)(23) were applied to a retiree hearing loss, by which benefits are payable only during the continuance of the impairment, the surviving spouse or other statutory survivor would be precluded from further recovery. This appears to be an unnecessarily harsh result, particularly when one considers that in an instance where death is caused by an occupational disease such as asbestosis, a claim may be made for death benefits as provided in Section 9 of the Act. 33 U.S.C. § 909.

In *Machado*, the Board noted that using the method advanced by the employer: applying § 908(c)(23) and arguing that this section mandates the use of a whole man conversion, with § 910(i) and § 910(d)(2)(B), the claimant would receive a minimal amount of compensation for life. While using the compensation rate for retirees strictly under the schedule, § 908(c)(13), § 910(i) and § 910(d)(2)(B) the benefits will closely approximate those of the workers still in the labor force, it will also promote an easily calculable amount of compensation, and promote speedy resolution of claims and their administration. *Machado*, 22 BRBS 181. The Board concluded that hearing loss benefits were properly compensable under § 908(c)(13), even in the case of retirees, and that Congress could not have intended the result argued for under § 908(c)(23). *Id.*

As already noted, another significant factor was considered by Administrative Appeals Judge Brown in his

concurring opinion in *Machado*. Judge Brown noted that § 908(f) was amended in 1984 to provide a specific exception for hearing loss claims falling under § 908(c)(13). *Id.*, 22 BRBS 183. For hearing loss claims an employer pays compensation for injury caused by employment at its facility, or 104 weeks of compensation, whichever is lower. Judge Brown opined that the Conference Report's comment that the change covered hearing loss cases compensated under Section 8(c)(13) signaled congressional intent to compensate hearing loss claims pursuant to § 908(c)(13). *Id.*, 22 BRBS at 183 (emphasis in original).

Based on the foregoing discussion, Claimants maintain that the Board correctly determined that hearing loss claims are to be Compensated under § 908(c)(13) regardless whether the claimant is an active or retired employee.

IV. IN THE EVENT THAT THE DECISION OF THE FIRST CIRCUIT IS SUSTAINED, CLAIMANT SHOULD BE ALLOWED TO RETAIN THE BENEFITS WHICH HE HAS RECEIVED UNDER THE DECISION OF THE BENEFITS REVIEW BOARD.

As should by now be obvious, the decision of this Court will directly affect the amounts to be received as compensation by retirees with hearing loss. As noted by the court below, however, it should not affect this particular claimant. The First Circuit found that the issue of whether Mr. Brown's compensation should be other than that awarded by the Board had been waived. *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 819 (1st Cir. 1991). The employer has not challenged that finding on appeal

so that portion of the First Circuit's opinion must be sustained.

V. CONCLUSION

Claimant respectfully requests that the Court reverse the decision of the First Circuit and remand with an order to affirm the Decision and Order of the Benefits Review Board.

In the event that the decision of the First Circuit is affirmed, claimant prays that on remand no further calculation of benefits be ordered, but that the previously awarded compensation be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, ETC.**

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, the amount of benefits payable to a retired claimant who suffered an employment-related hearing loss is calculated (a) under 33 U.S.C. 908(c)(13), which provides a scheduled award for loss of hearing; (b) under 33 U.S.C. 908(c)(23), which provides benefits when a worker's disability occurs after retirement; or (c) under a hybrid approach that uses parts of both 33 U.S.C. 908(c)(13) and 908(c)(23).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Ernest C. Brown is a respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-871

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, ETC.ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 942 F.2d 811. The decision and order of the Benefits Review Board (Pet. App. 21-30) and the decision and order of the administrative law judge (Pet. App. 31-47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1991. The petition for a writ of certiorari was filed on November 25, 1991, and granted on March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Longshore and Harbor Workers' Compensation Act and the Secretary of Labor's regulations are reprinted in pertinent part in the appendix to this brief.

STATEMENT

Respondent Ernest C. Brown, a former employee of petitioner Bath Iron Works, learned after he retired that he had suffered a work-related hearing loss. Pet. App. 9-10. All agree that Brown is entitled to benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA). The parties disagree as to how benefits for loss of hearing are calculated when a claim is brought by a retiree.

1. a. Until 1984, Section 8 of the LHWCA, 33 U.S.C. 908, provided only two different ways for calculating compensation for covered workers who sustained permanent partial disabilities. First, Section 8(c)(1)-(20), 33 U.S.C. 908(c)(1)-(20), lists certain body parts and functions, and provides that the loss of such a body part or function—including "loss of hearing," see Section 8(c)(13)—is automatically considered to be a permanent partial disability. A worker suffering one of these "scheduled" injuries is entitled under Section 8(c) to two-thirds of his or her average weekly wage for a specified number of weeks (ranging up to 312) depending on the type of injury. 33 U.S.C. 908(c)(1)-(18). If a worker suffers a partial loss of a body part or function listed on the schedule, the compensation period is reduced proportionately. 33 U.S.C. 908(c)(19).¹ A covered

¹ For example, because a complete loss of hearing in both ears (a binaural hearing loss) entitles a claimant to 200 weeks

employee with a "scheduled" injury is entitled to compensation at the specified amount "regardless of whether [the employee's] earning capacity has actually been impaired." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 269 (1980).

The second method for calculating compensation is set out in Section 8(c)(21). That Section does not establish fixed presumptions concerning lost earning capacity, and instead requires proof of actual impairment. It provides that covered workers with injuries that are not listed in the schedule are entitled to two-thirds of the difference between the worker's average weekly wage before the injury and the worker's residual earning capacity. Benefits are available for as long as the worker is impaired. 33 U.S.C. 908(c)(21).

Prior to the 1984 amendments, the Act did not specifically address a retired worker's entitlement to benefits for latent occupational diseases (such as asbestosis) that did not become manifest until after the worker's retirement. The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10) (1982). Relying on this definition, the Benefits Review Board held in several cases that a claimant who voluntarily retired before the appearance of asbestosis (which is not a scheduled injury) was not entitled to any compensation because he could not establish that his injury caused any loss of earn-

of compensation under Section 8(c)(13)(B), a claimant who suffers a 50% binaural hearing loss is entitled to 100 weeks of compensation.

ing capacity.² *Aduddell v. Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131, 133 (1984). Accord *Worrell v. Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 216 (ALJ) (1983); see also *Newport News Shipbuilding & Dry Dock v. Director, OWCP*, 681 F.2d 938, 942 (4th Cir. 1982). A sharply divided Board extended the holding of *Aduddell* to a claim for hearing loss, which is a scheduled injury, in *Redick v. Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. (MB) 155 (1984). The Board held in *Redick* that a worker who learned of his employment-related hearing loss six months after he retired was not entitled to benefits because he could not show that the injury impaired his earning capacity.

b. In 1984, Congress reacted to the inequity it perceived in the Board's treatment of retirees in the *Aduddell* line of cases by amending the Act to create a third system of compensation covering retirees suffering from diseases with long latency periods. As amended, Section 10(i), 33 U.S.C. 910(i), defines the "time of injury" for a claim involving a disease "which does not immediately result in death or disability" as "the date on which the employee or claimant becomes aware [or should have become aware] * * * of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. 910(i). If the "time of injury" under Section 10(i) is during the first year of the worker's retirement, the average earnings during the worker's final year of work are used to calculate the applicable average

² The Benefits Review Board was created by Section 21(b) of the LHWCA, 33 U.S.C. 921(b), to "hear and determine appeals * * * with respect to claims of employees under this [Act]." 33 U.S.C. 921(b) (3).

weekly wage. 33 U.S.C. 910(d) (2) (A). If the "time of injury" is after the worker's first year of retirement, then the national average weekly wage at that time applies. 33 U.S.C. 910(d) (2) (B). In either case, benefits are calculated by multiplying two-thirds of the appropriate average weekly wage by the claimant's percentage of permanent impairment as determined under the *Guides to the Evaluation of Permanent Impairment* (rev. 3d ed. 1990), which is published by the American Medical Association. 33 U.S.C. 908(c) (23). The claimant is entitled to benefits for the duration of the impairment. *Ibid.*

Thus, benefits for retirees with long-latency diseases differ from scheduled benefits in three ways. First, such benefits are paid weekly for as long as the worker is impaired, rather than for a set number of weeks as with a scheduled injury. Second, an award to a retiree on account of a disease that did not immediately result in death or disability is based on the impairment of the "whole person" under the *AMA Guides*, while a scheduled award is based on the degree of loss to the scheduled body part or function. For instance, a 100% hearing loss represents a 35% impairment of the worker under the *AMA Guides*. See Pet. App. 10. Third, the national average weekly wage is used when a latent disease manifests itself more than one year after the worker retires, while the worker's average weekly wage at the time of injury is always used in the case of a scheduled award.³

³ Thus, under the schedule, the claimant in this case, Ernest C. Brown, would be entitled to two-thirds of his average weekly wage during the last year that he worked for the number of weeks prescribed in Section 8(c). Section 8(c) (13) (B) provides for 200 weeks of recovery in the case of a binaural hearing loss; under Section 8(c) (19), that period

The 1984 amendments did not change the basic scheme for compensating claims for scheduled or unscheduled benefits in cases where the injury occurs before retirement. The amendments, however, did specifically address hearing-loss claims. The schedule was amended to provide that the time for filing a notice of injury, and the time for filing a claim, do not begin to run "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. 908(c)(13)(D). Thus, under Section 8(c)(13)(D), a worker who suffers a hearing loss, but does not know from an audiogram that his or her hearing has been impaired, is not barred from filing a claim. See 20 C.F.R. 702.221(b).⁴

would be reduced because Brown sustained an 82.4% hearing loss rather than a total hearing loss, so he would receive two-thirds of his 1972 average weekly wage for approximately 165 weeks (200 weeks times .824). Under the provision applicable to latent diseases that produce disability after retirement, on the other hand, Brown would receive 29% of two-thirds of the national average weekly wage in 1985 for as long as he was impaired, because an 82.4% hearing loss translates into a 29% impairment of the "whole person" under the AMA Guides. See Pet. App. 23.

⁴ The 1984 amendments also extended the time limits for giving notice to the appropriate deputy commissioner and to the employer of "an occupational disease which does not immediately result in a death or disability" to one year, and for filing a claim with respect to such a disease to two years. 33 U.S.C. 912(a), 913(b)(2). However, since hearing loss is not an "occupational disease which does not immediately result in a death or disability," the normal 30-day time period for giving notice and the one-year time period for filing claims apply in hearing loss cases, although those periods do not begin to run until the claimant receives an audiogram and an accompanying report. See 33 U.S.C. 912(a), 913(a); 20 C.F.R. 702.212(a).

2. Ernest C. Brown, the claimant in this case, worked for Bath Iron Works as a riveter and a chipper from 1939 until 1947, and again from 1950 until his retirement in 1972. Pet. App. 22. In 1985, after being informed that a 1983 hearing test indicated an employment-related 82.4% binaural hearing loss, Brown applied for longshore benefits. Pet. App. 9.⁵ The administrative law judge found that Brown's "hearing loss resulted, in part, from * * * acoustic trauma experienced while * * * employed at the Bath Iron Works shipyard and thus his hearing loss arose out of and in the course of his employment in Bath Iron Works." Pet. App. 39.⁶

In calculating benefits, the ALJ applied the "hybrid" approach previously adopted by the Benefits Review Board. Applying Section 10(i), the ALJ concluded that the "time of injury" for purposes of determining Brown's average weekly wage was September 6, 1985, when Brown received the results of the audiogram. Pet. App. 40. The ALJ accordingly used the national average weekly wage on September 6, 1985, as provided in Section 10(d)(2)(B), which applies in cases where a latent disease produces disability after retirement, rather than Brown's average

⁵ Brown relied on the tolling provision for scheduled hearing losses in Section 8(c)(13)(D) to overcome the 13-year gap between the time he retired and the time he filed his claim. The administrative law judge held that Brown's "claim is not time barred" because Brown did not receive an audiogram and accompanying report until 1985. Pet. App. 36. Petitioners do not challenge that conclusion.

⁶ The ALJ also determined that, under established precedent, Brown was entitled to compensation for the full extent of his hearing loss even though this loss was not caused exclusively by noise exposure in his employment. Pet. App. 38-39.

weekly wage before he retired, as provided in the schedule. Pet. App. 37-38. However, rather than awarding benefits for the duration of the disability, as set forth in Section 8(c)(23) (which applies to claims where a latent disease produces disability after retirement), the ALJ limited the award to a total of 165 weeks under Section 8(c)(13), the hearing loss provision in the schedule. Furthermore, the ALJ did not convert Brown's 82.4% hearing loss into a percentage of whole person impairment under the AMA Guides, as required by the provisions governing cases where a latent disease produces disability after the claimant retires. Pet. App. 45-46. In short, the ALJ, following Board precedent requiring the use of a hybrid approach, used a calculation method that combined portions of the schedule and portions of the provisions governing cases where a latent disease produces disability after a claimant retires.⁷

The Board upheld the ALJ's determinations. Relying on its prior decision in *Machado v. General Dynamics Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 176 (1989) (en banc), and the Fifth Circuit's decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088 (1990), the Board held that the ALJ properly determined that the "time of injury" under Section 10(i) occurred in 1985, when Brown re-

⁷ The ALJ also determined that Bath Iron Works was entitled to have its liability limited under Section 8(f) of the Act, 33 U.S.C. 908(f), because Brown had a preexisting hearing loss that was aggravated by his work at Bath Iron Works. Specifically, the ALJ held that the "special fund" created by 33 U.S.C. 944 was liable for 81.2 weeks of payments based on the 40.6% hearing loss that Brown suffered by 1954, while Bath Iron Works was responsible for the remaining 83.6 weeks based on a 41.8% hearing loss suffered after 1954. Pet. App. 42-43. The Section 8(f) issue is not before the Court.

ceived the results of the audiogram, and therefore correctly used the national average weekly wage at that time, as provided by Sections 8(c)(23) and 10(d)(2). Pet. App. 24. However, the Board disagreed with the Fifth Circuit's holding in *Ingalls Shipbuilding*, which was that benefits must be calculated entirely under the rules governing latent diseases that produce disability after retirement. The Board instead adhered to the hybrid approach it adopted in *Machado*. Furthermore, noting that benefits are typically less generous under the provisions governing latent diseases than under the schedule, the Board concluded that it would be unfair to treat retirees with hearing losses less favorably than claimants who were still working. *Id.* at 23-26.⁸

3. The First Circuit affirmed for the reasons advanced by the Director of the Office of Workers' Compensation Programs. Thus, it held that the "time of injury" in a hearing loss case is when the claimant's hearing was impaired and that benefits in a hearing-loss case must be calculated under the schedule. The court of appeals rejected the Board's hybrid approach and the approach adopted by the Fifth Circuit in

⁸ Two of the Board's five members wrote separate opinions arguing that the Board had incorrectly decided *Machado*, and that benefits should be calculated under Section 8(c)(23), as the Fifth Circuit concluded in *Ingalls Shipbuilding*, rather than under the Board's hybrid approach. One of those Board members dissented on these grounds (McGranery, J., Pet. App. 29-30), but the other (Stage, C.J., Pet. App. 27-28) concurred on the ground that the Board should adhere to its precedent since the First Circuit had not yet ruled on the issue. A third Board member (Brown, J., Pet. App. 28-29) agreed with the Board's hybrid approach, but dissented because of his view that Bath Iron Works should not obtain relief under Section 8(f), but should be liable for the full amount of Brown's award.

Ingalls Shipbuilding, both of which are based on the premise that the "time of injury" in a hearing loss case is not the time at which the hearing loss occurs. Pet. App. 14.

In the First Circuit's view, the key question for determining which approach applies is whether the occupational hearing loss occurred before or after retirement.⁹ In this regard, the court agreed with the Director that occupational hearing loss is an injury, unlike diseases such as asbestosis, that "a worker typically suffers *before* retirement." Pet. App. 12. Similarly, the court accepted the fact that occupational hearing loss has no latency period, but rather develops simultaneously with exposure to excessive noise. *Id.* at 13. Accordingly, the court concluded that the "language applicable to System Three [the provisions governing latent diseases that produce disability after retirement] makes clear that that System does not apply at all" to hearing loss cases, since those provisions apply only when the disability occurs *after* retirement. *Id.* at 12. Rather, the statute "mandate[s] compensation according to System One [the schedule]" in cases where the injury occurred before retirement. *Ibid.*

The court emphasized the long-settled principle that "the statute *presumes* that a worker who suffers a scheduled injury suffers an 'incapacity because of injury to earn' prior wages." Pet. App. 16, citing *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2d Cir.), cert. denied, 350 U.S. 913 (1955); see also

⁹ For analytical purposes, the court designated "scheduled injuries" (in Section 8(c)(1)-(20), 33 U.S.C. 908(c)(1)-(20)) as "System One"; "unscheduled injuries" (in Section 8(c)(21), 33 U.S.C. 908(c)(21)) as "System Two"; and "injuries suffered by retired workers" (in Sections 2(10), 8(c)(23), 10(d), and 10(i), 33 U.S.C. 902(10), 908(c)(23), 910(d), 910(i)) as "System Three." See Pet. App. 2-4.

Potomac Elec. Power Co., 449 U.S. at 269 (a worker with a scheduled injury is entitled to benefits "regardless of whether his earning capacity has actually been impaired"). The court therefore rejected the Board's reasoning in *Redick* that the schedule does not govern a post-retirement hearing-loss claim because the claimant has not suffered a loss of wage-earning capacity. Rather, it concluded that *Redick* was either wrongly decided or distinguishable because it may have involved a special case of latent hearing loss. Pet. App. 15-16.

Similarly, the court rejected the argument—based on a comment by Senator Hatch, a sponsor of the 1984 amendments, listing *Redick* as one of several cases that "did not represent equitable policy," 130 Cong. Rec. 26,300 (1984)—that Congress intended the new provisions governing latent disease to govern hearing-loss cases. Pet. App. 17. The court observed that "insofar as [*Redick*] dealt with typical hearing loss * * *, it could be corrected judicially and did not necessarily require special legislation." *Ibid.* The court also noted that "the legislative debates primarily concerned 'long-latency diseases,' such as asbestosis, not hearing loss, and there is no good reason for thinking that Senator Hatch, in his effort to correct unfairness, did want, or would have wanted, the law to treat 'hearing loss' cases less generously than it would have done without the amendments." *Ibid.*

The court explicitly disagreed, Pet. App. 18, with the Fifth Circuit's decision in *Ingalls Shipbuilding*. In *Ingalls*, the Fifth Circuit acknowledged, but found irrelevant, that hearing loss differs from asbestosis in that the full extent of the injury from occupational hearing loss precedes the worker's retirement. 898 F.2d at 1093. Relying on Senator Hatch's statement, the *Ingalls* court concluded that, although "the Direc-

tor's reading * * * is arguable, * * * the legislative history indicates that Congress created a single scheme for *retirees* regardless of the nature of their occupational disease." *Id.* at 1094. The First Circuit, however, concluded that the statutory language clearly "treats a hearing loss case differently than an asbestosis case for the very reason that the Fifth Circuit found irrelevant," *i.e.*, because "the 'time of injury' in the first case, but not the second case, is prior to retirement." Pet. App. 18.¹⁰

Although the court also disagreed with the Board's hybrid approach, the court affirmed the Board's judgment. The court explained that neither Bath Iron Works nor the Director had asked the court of appeals to recalculate the award, and Brown profited since the error resulted in a higher payment, so it "consider[ed] the issue waived." Pet. App. 19-20. Petitioners do not separately challenge the ruling on this point.

SUMMARY OF ARGUMENT

1. The First Circuit correctly concluded that the benefits payable to respondent Brown, a retired maritime worker who suffered an employment-related hearing loss, must be calculated under the provisions governing scheduled injuries. The schedule spe-

¹⁰ For similar reasons, the court distinguished two cases holding that "time of injury" is the date when a disease manifests itself, rather than the date of last exposure to what caused the injury. *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir.), cert. denied, 474 U.S. 846 (1985); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289-1291 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984). Those cases, the court explained, involved asbestosis claims where the disabling symptoms first appeared *after* retirement, and were thus "inapplicable here, where hearing loss is fixed forever before retirement." Pet. App. 19.

cifically provides a fixed award for hearing loss in Section 8(c)(13). Further, the language of the Act makes no distinction between retirees and current employees who suffer scheduled injuries—both groups are entitled to compensation in the amounts fixed by the schedule. Section 8(c)(13)(D), which Congress added in 1984 to extend the time within which to bring hearing loss claims under the schedule, confirms that occupational hearing loss is to be compensated under the schedule.

The First Circuit correctly rejected the Fifth Circuit's approach, adopted in *Ingalls Shipbuilding*, under which retirees' hearing loss awards are calculated under Section 8(c)(23) and the other provisions adopted in 1984 to govern cases involving latent diseases that do not produce disability until after a worker retires. Section 10(i) makes clear that those provisions apply only where injury was "due to an occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i). The scientific literature compels the conclusion—which is, in any event, undisputed—that occupational hearing loss is not such a disease. Rather, unlike asbestosis, which develops following a latency period, occupational hearing loss occurs at the time that a worker is exposed to excessive noise, and does not progress thereafter.

The First Circuit also correctly rejected the hybrid approach adopted by the Benefits Review Board. There is simply no statutory basis for picking and choosing from among the various components of the formulae set out in the statute governing different types of awards.

2. Resort to legislative history is unnecessary in this case. That history, nevertheless, does not contradict the statutory language indicating that the special

rules governing latent diseases do not govern hearing loss claims brought by retirees. With the exception of one comment by a senator describing as inequitable the Board's *Redick* decision (the decision holding that retirees may not obtain compensation for hearing loss), the legislative history focuses solely on progressive diseases such as asbestosis. The congressional reports thus confirm the conclusion that the special rules adopted in 1984 (other than the rule extending the time within which to obtain compensation for hearing loss under the schedule) were only intended to govern claims based on diseases that do "not immediately result in death or disability," as Section 10(i) clearly states.

3. The interpretation of the Director of the Office of Workers' Compensation Programs, who is charged with administering the LHWCA, is reasonable and entitled to deference. Shortly after the Act was amended, the Director promulgated a regulation, 20 C.F.R. 702.212, specifying when notice of an injury is due under the LHWCA. The regulation treats occupational hearing loss like other claims governed by the schedule, and provides that occupational hearing loss is not subject to the special rules applicable to "occupational disease which does not immediately result in death or disability." Although we believe that conclusion is plainly mandated by the statute, any ambiguity should be resolved in favor of the Director's reasonable interpretation.

ARGUMENT

THE AMOUNT OF BENEFITS PAYABLE TO A RETIRED CLAIMANT WHO SUFFERED AN EMPLOYMENT-RELATED HEARING LOSS IS CALCULATED UNDER THE SCHEDULE SET OUT IN SECTION 8(c)(13) OF THE LHWCA

The court of appeals correctly held that the LHWCA mandates that respondent Brown's compensation for hearing loss be calculated under the terms of the schedule set forth in Section 8(c)(13). As the court of appeals determined, this interpretation is compelled by the plain language of the Act, and does not conflict with the legislative history. Even if the statutory terms were "replete with ambiguity," as petitioners contend, Br. 16, the Director's reasonable interpretation of the statutory provisions is entitled to deference.¹¹

A. The Language Of The Statute Compels The Conclusion That Hearing Loss Awards Are Calculated Under The Schedule

1. The schedule set out in Section 8(c) of the LHWCA provides a formula for calculating benefits

¹¹ As in any case involving statutory interpretation, the "starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). If the statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). If the statute is silent or ambiguous on the question, the court then must determine whether the agency's construction is a "permissible" one. *K Mart*, 486 U.S. 291-292; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In such a case, the court must defer to the agency's interpretation so long as it is reasonable and consistent with the statutory purposes. *K Mart*, 486 U.S. at 292.

for a variety of occupational injuries, including "loss of hearing," which is listed in Section 8(c)(13). There is no question that if Brown were still working, his hearing loss would be compensable under that schedule. The fact that Brown has retired is simply of no consequence under the statutory scheme.

It has long been settled that a worker who suffers a "permanent disability," such as the loss of a limb or the loss of hearing, is conclusively presumed to have suffered an incapacity to earn wages and is entitled to the benefits listed in the schedule regardless of whether he continues to work. Pet. App 16. As this Court has recognized, "the injured employee is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired." *Potomac Elec. Power Co.*, 449 U.S. at 269. As the First Circuit recognized, the Board's decision in *Redick* was therefore "simply wrong" if it was based on the assumption that a retired worker cannot obtain compensation under the schedule for a work-related injury because a retiree cannot establish an "incapacity" to earn wages. Pet. App. 16.

While the loss of an arm or a leg is always immediately obvious, Congress has recognized that loss of hearing is not. Accordingly, Congress in 1984 amended the schedule to provide a special rule for hearing loss cases, under which "[t]he time for filing a notice of injury * * * or a claim for compensation * * * shall not begin to run in connection with any claim for loss of hearing * * * until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 13 U.S.C. 908(c)(13)(D). The 30-day time period for giving notice to the employer and the one-year time limit for

filing a claim, which govern all claims under the schedule, therefore pose no unfair bar to hearing loss claims.¹²

In short, the schedule specifically deals with hearing loss claims. And as the First Circuit recognized, the fact that hearing loss is often overlooked for a period of time after it occurs presents no substantive or procedural bar to recovery by retirees who have suffered a work-related hearing loss.

2 Petitioners argue that the First Circuit erred, while the Fifth Circuit was correct in concluding in *Ingalls Shipbuilding*, 898 F.2d at 1096, that Section 8(c)(23) and the other provisions relating to latent diseases that produce injury after retirement govern the calculation of benefits in cases involving claims for hearing-loss benefits brought by retirees. Under petitioners' approach, Brown would receive less compensation, because an award under Section 8(c)(23) would be based on the percentage of impairment of the "whole person," rather than the percentage of impairment of hearing. See note 3, *supra*.

a. Petitioners stress that Section 8(c)(23) applies "notwithstanding" Section 8(c)(13). Br. 7. But

¹² In *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1567 (11th Cir. 1991), the court was troubled because "[i]f the Director is correct, the statute appears silent on the time of injury for compensation of hearing loss and any other occupational disease which *does* immediately cause death or disability." The court rejected the Director's argument that "the date of last exposure," that is, "the date on which the disabling condition is complete," sets the "time of injury." *Ibid*. But since occupational hearing loss occurs simultaneously with exposure to excessive noise and does not progress following removal from the noisy environment, see *id.* at 1566, Pet. App. 12, the date of last exposure is the relevant "time of injury," just as the date on which a worker loses a finger is the "time of injury" for that sort of scheduled disability.

Section 8(c)(23) applies only "to a claim * * * for which the average weekly wages are determined under section 910(d)(2)." 33 U.S.C. 908(c)(23). Section 10(d)(2) in turn provides a method for calculating average weekly wages for

disability due to an occupational disease for which the time of injury (as determined under subsection (i) * * * occurs—

(A) within the first year after the employee has retired, * * * or

(B) more than one year after the employee has retired * * * .

Section 10(i), the subsection referenced in Section 10(d)(2), provides a method of determining the time of injury for "disability due to an occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i). Thus, Section 8(c)(23) and the provisions it references govern only latent diseases that produce disability after retirement. They do not apply to cases involving an occupational disease that immediately results in death or disability. In short, as the First Circuit stated, while the statute "seems complex * * * , it basically says something that is fairly simple: When the 'time of injury' occurs before retirement, the Labor Department should calculate compensation under either System One (if the injury is scheduled) or System Two (if the injury is not scheduled)." Pet. App. 7. Section 8(c)(23), on the other hand, applies only "[w]hen the 'time of injury' occurs after retirement." Pet. App. 7-8.

Since the "time of injury" is critical in determining which statutory provision governs, to prevail petitioners must show that hearing loss is a disability

that can occur after retirement. But petitioners make no claim that hearing loss does not result in immediate disability. To the contrary, they admit that "occupational loss of hearing is immediate because it does not progress following exposure to noise." Br. 8. Similarly, in *Ingalls Shipbuilding*, the case on which petitioners rely, the Fifth Circuit recognized "that hearing loss does not progress after retirement." 898 F.2d at 1093.¹³ Thus, it is undisputed that Brown had incurred the full extent of his occupational hearing loss before he retired. That conclusion is compelled by the relevant scientific literature, which shows that, unlike asbestosis, occupational hearing loss has no latency period. See R. Sataloff & J. Sataloff, *Occupational Hearing Loss* 357 (1987); see also Pet. App. 12.¹⁴

The First Circuit correctly concluded that, while the LHWCA seems complex, "its language treats a hearing loss case differently than an asbestosis case

¹³ The Eleventh Circuit, on which petitioners also rely, likewise recognized that "occupational hearing loss does not get worse once the employee leaves the employment." *Alabama Dry Dock & Shipbuilding Corp.*, 933 F.2d at 1566.

¹⁴ The disease—in medical terms, sensorineural hearing loss due to cumulative acoustic trauma; in statutory terms, "loss of hearing" "aris[ing] naturally out of [the] employment," Sections 8(c)(13), 2(2)—is partly dose-related, sometimes imperceptible at onset, and often worsens with additional exposure to excessive noise. 33 U.S.C. 908(c)(13), 902(2). But unlike asbestos-related lung conditions, which continue to progress once set in motion by inhalation of asbestos, hearing loss has no "latency period," i.e., no delay between the injurious exposure and the appearance of the harm resulting from it. Hearing loss due to cumulative acoustic trauma occurs contemporaneously with the noise exposure that causes it, and does not progress after removal from the injurious noise. R. Sataloff & J. Sataloff, *supra*, at 357.

for the very reason that the Fifth Circuit found irrelevant." Pet. App. 18. "Using ordinary English," the First Circuit logically concluded "that a worker who becomes deaf before retirement is a worker whose disability 'occurs' *before* retirement, not after retirement," and that because "deafness is a disease that causes its symptoms * * * simultaneously with its occurrence," it cannot qualify as an occupational disease "which does not immediately result in death or disability." *Id.* at 13. Thus, the court below correctly rejected petitioners' contention that Section 8(c)(23) and the other provisions governing latent diseases apply in this case.

b. Contrary to petitioners' contention, Br. 11-12, that conclusion is unaffected by the fact that a claimant like Brown may be entitled to compensation for his entire hearing loss, including age-related hearing loss (presbycusis) that progresses after retirement, where the employer cannot demonstrate what portion of the hearing loss was due to occupational exposure. An award under the LHWCA must be based on an occupational injury. In this case, it is undisputed that Brown suffered an occupational hearing loss due to exposure to excessive noise at Bath Iron Works, Pet. App. 39, and that is the basis for the award. Because occupational hearing loss does not progress after exposure to excessive noise ends, Brown's occupational hearing loss cannot be said to have developed after retirement.

The fact that Brown may not have become aware of his occupational hearing loss until presbycusis further worsened his condition does not negate the fact that he had previously suffered a loss made compensable by the Act. In short, petitioners' assertion that Brown's presbycusis progressed after retirement is irrelevant to determining when the occupational

hearing loss occurred and which statutory provision applies.

The equities asserted by petitioners provide no basis for implying an exception into the statutory scheme. Moreover, employers can protect against any perceived unfairness resulting from this scheme by providing an audiogram at the time of retirement, thereby "freezing" the amount of compensable hearing loss at that point in time. Cf. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 840-841 (9th Cir. 1991) (employer not liable for hearing loss for which there is no possible rational connection with employment).

3. The hybrid approach employed by the Board in this case finds even less support in the language of the statute than petitioners' interpretation. That approach will often yield the most generous award to retired claimants, as in this case, Pet. App. 19-20, because it utilizes a recent national average weekly wage, instead of actual wages from prior years (as provided under Section 8(c)(23)), but the award is not reduced to reflect the loss to the "whole person," as required by the provisions governing awards for latent diseases that produce disability after retirement. Respondent Brown accordingly supports the approach employed by the Board in this case.¹⁵

There is no statutory basis whatsoever for the hybrid approach. Section 8(c) sets out a general formula for use in calculating benefits under the schedule, and Section 8(c)(13) specifically provides for scheduled benefits for loss of hearing. Section 8(c)(23) sets

¹⁵ Even though the court of appeals affirmed the Board's judgment rather than remanding for a reduction in benefits to the amount provided under the schedule because petitioners had waived the issue, see Pet. App. 19-20, Brown fears that petitioners may seek to recoup the overpayment.

out a different formula that applies in latent disease cases where the disability arises after the claimant retires. The Board was not free to creatively combine elements from various parts of the LHWCA in order to maximize the amount of the award. Partially recognizing its error, the Board has recently abandoned the hybrid approach and adopted the Fifth Circuit's approach. *Harms v. Stevedoring Services of America*, No. 89-1344 (Ben. Rev. Bd. Apr. 29, 1992).¹⁶

B. The Legislative History Supports The Conclusion That Hearing Loss Is Compensated Under The Schedule

Petitioners recognize that this Court may decide this case by looking "no farther than the words 'occupational disease which does not immediately result in disability or death'" in Section 10(i). Br. 16. But they contend that "ambiguities make it impossible to follow the admonition that, in construing the LHWCA, 'the wisest course is to adhere closely to what Congress has written.'" *Ibid.*, quoting *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925 (1984). Petitioners instead urge this Court to turn to the legislative history.

¹⁶ The Board stated, with respect to the First Circuit's decision in this case, that "we differ from the conclusion in *Bath Iron* that hearing loss should be distinguished from other occupational diseases because symptoms arise during employment." Slip op. 7. In the Board's view, "there is no evidence that Congress intended such a distinction by using the phrase 'occupational disease which does not immediately result in death or disability.'" *Ibid.* But the language Congress adopted says that occupational diseases that do not immediately result in disability are to be treated differently from occupational hearing loss, which produces immediate disability and is compensable under the schedule.

Resort to that history is unnecessary, and therefore inappropriate. It nevertheless does not support petitioners' claims. Petitioners rely primarily on a reference by Senator Hatch to *Redick*, the Board decision that held that a retiree may not obtain benefits for hearing loss. Specifically, after describing *Aduddell*, the asbestosis case where the Board held that the claimant was not entitled to benefits because he could not show a loss of earning capacity, Senator Hatch said that "[a]n identical result was reached in *Redick v. Bethlehem Steel Corporation*, 16 BRBS 155 (Mar. 20, 1984)." 130 Cong. Rec. 26,300 (1984). Senator Hatch subsequently stated that "these interpretations of the Longshore Act did not represent equitable policy." *Ibid.* From this reference to *Redick*, petitioners argue that Section 8(c)(23) should be applied to hearing loss cases even though, under Section 10(i), the provision applies only in cases involving "occupational disease which does not immediately result in death or disability" and hearing loss is not such a disease.

As the court of appeals stated, petitioners "seek[] to prove far too much on the basis of far too little." Pet. App. 17. For one thing, apart from Senator Hatch's single passing reference to *Redick*, the legislative history to the 1984 amendments focused exclusively on diseases such as asbestosis and silicosis, which, because of long latency periods, can actually develop and progress after retirement.¹⁷ Further-

¹⁷ For example, Representative Miller twice mentioned the Board's asbestosis decision in *Aduddell*, without mentioning *Redick*. 130 Cong. Rec. 25,902-25,903 (1984). Similarly, the conference report mentions *Aduddell* without mentioning *Redick*. H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 30 (1984).

more, as the court below observed, Senator Hatch's criticism of *Redick* could be read as a suggestion that the Board misconstrued the pre-amendment statute, so that judicial overruling would suffice to correct the erroneous decision.¹⁸

Petitioners also rely, Br. 16-18, on references in the legislative history that show Congress's concern with the date on which the occupational disease "manifests" itself. But there is no apparent relevance of this history to compensation for hearing loss, which is a scheduled disability and not an "occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i). While Section 10(i) defines "time of injury" as the date on which the "claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability," it does so only for such an occupational disease. Petitioners' argument would essentially deny any meaning to the limiting phrase "not immediately result[ing] in death or disability."¹⁹

¹⁸ Moreover, Senator Hatch did not point out that *Redick* was a hearing loss case. Even a congressman who paid close attention to Senator Hatch's floor remarks probably would have thought that *Redick* was an asbestosis case, since Senator Hatch first explained that *Aduddell* was an asbestosis case, next stated that "[a]n identical result was reached" in *Redick*, 130 Cong. Rec. 26,300 (1984), and then noted that in *Worrell* an ALJ applied *Aduddell* to deny benefits where the claimant's decedent developed mesothelioma after retirement as a result of exposure to asbestos.

¹⁹ As already noted, Congress responded to the problem presented by the fact that hearing loss is sometimes not

The legislative history supports a straightforward reading of the 1984 amendments. As noted, other than the passing reference to *Redick*, the history focused exclusively on diseases like asbestosis that have a long latency period. The House Report accompanying the 1984 amendments described diseases that do "not immediately result in death or disability" as "disabling conditions which do not develop immediately after the initial change in the body of the worker resulting from the exposure to a toxic substance or harmful physical agent, or which do not even result in a change in the body immediately after the exposure to the causative toxic substance or harmful physical agent." H.R. Rep. No. 570, 98th Cong., 1st Sess. 11 (1984). This statement reinforces what the language of the amendments plainly provides: a disease "not immediately result[ing] in * * * disability" is one that does not immediately result in disabling symptoms or physical changes. Petitioners agree, as the court of appeals recognized, that occupational hearing loss "is a disease that causes its symptoms, namely loss of hearing, simultaneously with its occurrence." Pet. App. 13. And under Section 8(c)(13), those symptoms constitute a disability as soon as they arise. Therefore, the legislative history amply supports the First Circuit's conclusion that occupational hearing loss is not the type of disease Congress meant to cover in Section 8(c)(23) and related provisions.

noticed for a period of time by adding Section 8(c)(13)(D) to the schedule in 1984, so that the time to give notice and file a claim for hearing loss does not begin to run until the worker receives an audiogram and an accompanying report showing a hearing loss.

C. The Interpretation Of The LHWCA Provided By The Director Of The Office Of Workers' Compensation Programs Is Entitled To Deference

Congress has provided that the Secretary of Labor "shall administer" the LHWCA, and she has express authority "to make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a). The Secretary has delegated her authority to administer the LHWCA to the Director of the Office of Workers' Compensation Programs. 20 C.F.R. 701.202. Accordingly, his statutory analysis is entitled to deference under the principles enunciated by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See, e.g., *Force v. Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 208-209 (4th Cir. 1990); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983).²⁰ The views of the Benefits Review Board, on the other hand, are not entitled to deference because the Board is not charged with administering the Act.

²⁰ Not all courts of appeals have afforded deference to the Director. See *Director, OWCP v. General Dynamics Corp. (Krotsis)*, 900 F.2d 506, 510 (2d Cir. 1990); *Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 287-288 (6th Cir. 1988); *Director, OWCP v. O'Keefe*, 545 F.2d 337, 343 (3d Cir. 1976). These cases are based on the erroneous premise that "neither the Director nor the Board is the officer or agency charged with the administration of the [LHWCA]." 545 F.2d at 343. To the contrary, the Director administers the LHWCA to the same extent as he administers the Black Lung Benefits Act, see *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987), and in the same sense as the Secretary of Labor administers the Occupational Safety and Health Act, see *Martin v. OSHRC*, 111 S. Ct. 1171 (1991).

Potomac Elec. Power Co., 449 U.S. at 278 n.18. Accordingly, even if the interpretation urged by the Director in this case were not compelled by the language of the statute, that interpretation nevertheless would be entitled to deference because it represents a longstanding, consistent, and reasonable construction of the Act.

The Director promulgated a regulation in 1985 that clearly expressed his view that hearing loss is not subject to Section 8(c)(23) and the other provisions governing latent diseases that develop after retirement. Specifically, 20 C.F.R. 702.212(a)(2) requires that a hearing-loss claimant give notice of injury within 30 days of the date of injury (specially defined for this purpose as the date on which the claimant receives an audiogram and report), rather than within one year of the date of awareness as required (see 20 C.F.R. 702.212(b)) for occupational diseases that "do not immediately result in death or disability." The Director explained that a hearing-loss claimant is not subject "to the extended time requirements applicable to occupational diseases that do not immediately result in disability or death, since a hearing loss could entitle an employee immediately to a schedule award of compensation." 50 Fed. Reg. 389 (1985).²¹ The regulation shows that the Director has consistently interpreted the statute such that hearing loss claims are to be brought under the provisions of the schedule, and not under the special rules applicable to latent diseases that produce disability after retirement.

²¹ Thus, petitioners are wrong to imply, Br. 9 n.4, that the Director's interpretation is only a litigating position unworthy of deference. But see *Martin*, 111 S. Ct. at 1179 (litigating position is owed deference when it is not a mere post hoc rationalization).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1992

APPENDIX

Section 2(10) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(10), provides:

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

Section 8(c)(13), 33 U.S.C. 908(c)(13), provides, in pertinent part:

(c) Permanent partial disability: In the case of disability partial in character but permanent in quality the compensation shall be 66-2/3 per centum of the average weekly wages, * * * and shall be paid to the employee, as follows:

* * * * *

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a li-

(1a)

censed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time that it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

Section 8(c)(21), 33 U.S.C. 908(c)(21), provides:

(21) Other cases: In all other cases in the class of disability, the compensation shall be $66\frac{2}{3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

Section 8(c)(23), 33 U.S.C. 908(c)(23), provides:

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average

weekly wages are determined under section 10(d)(2), the compensation shall be $66\frac{2}{3}$ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

Section 10(d)(2), 33 U.S.C. 910(d)(2), provides:

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i)) occurs—

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 6(b)) applicable at the time of injury.

Section 10(i), 33 U.S.C. 910(i), provides:

(i) For the purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence

or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

20 C.F.R. 702.212 provides, in pertinent part:

(a) For other than occupational diseases described in (b), the employee must give notice within thirty (30) days of the date of the injury or death. For this purpose the date of injury or death is:

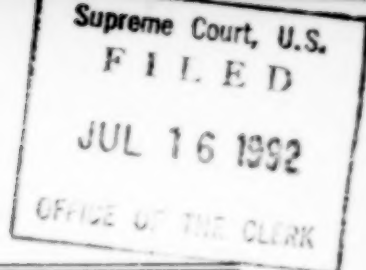
(1) The day on which a traumatic injury occurs;

(2) The date on which the employee or claimant is or by the exercise of reasonable diligence or by reason of medical advice, should have been aware of a relationship between the injury or death and the employment; or

(3) In the case of claims for loss of hearing, the date the employee receives an audiogram, with the accompanying report which indicates the employee has suffered a loss of hearing that is related to his or her employment. (See § 702.441).

(b) In the case of an occupational disease which does not immediately result in disability or death, notice must be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware, of the relationship between the employment, the disease and the death or disability. For purposes of these occupational diseases, therefore, the notice period does not begin to run until the employee is disabled, or in the case of a retired employee until a permanent impairment exists.

No. 91-871



In The
Supreme Court of the United States
October Term, 1992

BATH IRON WORKS CORPORATION and
COMMERCIAL UNION INSURANCE COMPANIES,

Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY BRIEF FOR PETITIONERS

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PETITIONERS' ARGUMENT IN REPLY

1. The Benefits Review Board Has Abandoned Its "Hybrid" Approach and Now Agrees with Petitioners.

The Employee devotes his entire brief to a defense of the Board's "hybrid" interpretation of the statutory scheme at issue. The Board, as noted in the briefs previously filed, held in this and other cases that hearing loss benefits for retirees are initially allowed under the "retiree amendments", including §908(c)(23) and §910(i), but that a lump sum benefit is calculated under §908(c)(13), which is the scheduled provision that governs all other claims for hearing loss.

However, on April 29, 1992, the Board elected to "revisit" this issue. In *Harms v. Stevedoring Services of America*, 25 BRBS 375, 1992 WL 110691 (April 29, 1992), the Board agreed with the Fifth and Eleventh Circuits that, since §910(i) is applicable to a retiree's hearing loss claim, the average weekly wage must be determined under §910(d)(2) and compensation paid under §908(c)(23). Consequently, there remains *no* authority for the position advanced by the Employee.¹

The Board aligned itself with the Fifth and Eleventh Circuits rather than the First Circuit for two reasons. One, the Board found no evidence that Congress intended to distinguish hearing loss from other occupational diseases.

¹ That §908(c)(13) does not always favor the employee is evident from *Harms*, where the employee argued that §908(c)(23) should apply while the Employer submitted that §908(c)(13) should govern.

Two, it noted that other occupational diseases including asbestosis may cause symptomatology prior to retirement, and that the mere onset of symptoms does not give rise to the "time of injury" under the Act. Rather, it is the employee's awareness of the relationship between the disease, employment and disability that defines the "time of injury".

Indeed, a worker exposed to asbestos may demonstrate symptoms and disability before retirement, but if he is not aware of that disability and its work-relatedness until after retirement, his "time of injury" follows retirement under §910(i). It is not possible to distinguish this situation from a case such as Mr. Brown's where a compensable hearing loss worsens after retirement. At the very least, Congress did not attempt to make such a distinction, even if one could be said to exist.

For these reasons, the Board concluded as follows:

Given these considerations, we believe that the reasoning of the Fifth and Eleventh Circuits in *Ingalls Shipbuilding* and *Sowell* is more compelling than that of *Bath Iron*. We therefore continue to hold that hearing loss is an occupational disease covered by Section 10(i). Moreover, having reached this conclusion, we have reconsidered our decision in *Machado* and now agree with *Ingalls Shipbuilding* that the language of the statute requires application of Section 8(c)(23) to voluntary retirees suffering occupational diseases, including those with hearing losses. Accordingly, the decision in *Machado* is hereby overruled to the extent it holds that retirees with hearing losses should be compensated under Section 8(c)(13).

While this Court has confirmed that the Board is entitled to no special deference, *Potomac Elec. Power Co. v. Director, O.W.C.P.*, 449 U.S. 268, 278 n. 18, 101 S.Ct. 509, 514-15 n. 18 (1980), this Court should not overlook the fact that the First Circuit now stands alone in holding that §908(c)(13) rather than §908(c)(23) governs hearing loss claims submitted by retirees.

2. Section 910(i) Revisited.

The statutory analysis required in this case returns again and again to the meaning of §910(i) because, by nearly all accounts, if §910(i) applies then so too does §908(c)(23). The legislative history behind the 1984 "retiree amendments" has been thoroughly examined² and the statute as a whole read and re-read. Petitioners submit that a final examination of the four corners of §910(i) proves their case and disproves the Director's. Section 910(i) is again reproduced as follows:

(i) For purposes of this section with respect to a claim for compensation for death or *disability* due to an occupational disease which does not immediately result in death or *disability*, the

² The Director submits that Senator Hatch's reference to *Redick v. Bethlehem Steel Corporation*, 16 BRBS 155 (1984) should be discounted because (1) he didn't refer to *Redick* or other hearing loss cases as frequently as he and others referred to asbestos claims and (2) Senator Hatch's reference *could* be read as suggesting that the Board was wrong and could be corrected judicially. However, the one specific reference to *Redick* as being identical to and as unfair as asbestosis cases is exactly one more *specific* piece of evidence concerning Congress' intent than the Director identifies in support of his position.

time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or *disability*. [Emphasis added.]

Congress employed the word "disability"³ three times in §910(i). The first "disability" referenced in §910(i) is to the *claim* for disability which, in this case, is a claim for the disability that existed in 1983 as defined by a 1983 audiogram. The *third* disability referenced is to the employee's *awareness* of his disability which, in this case, is awareness of the disability that existed in 1983 as defined by the 1983 audiogram. Significantly, that "disability" is *not* the same "disability" as that which existed when the Employee retired in 1972 (See Pet. Br. 12).

The *second* "disability" referenced constitutes the statute's linchpin. The reference is to disease which does not immediately result in "disability". The Director takes this to mean *any* disability. However, if one reads the provision as a whole, and reads each "disability" as meaning the same thing, then the inescapable conclusion is that §910(i) applies to claims where the "disability" that is claimed, and of which the Employee becomes aware, is that which exists after retirement.

³ "Disability", for claims involving loss of hearing, is defined as "impairment" under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 33 U.S.C. §902(10), §908(c)(13)(E).

This reading of the statute is consistent with the rule of statutory construction that statutory language must be read in context, and that,

"[i]n ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."

McCarthy v. Bronson, 500 U.S. ___, 114 L.Ed.2d 194, 111 S.Ct. 1737 (1991), citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811 (1988).

3. The Director Would Resurrect The Discredited "Last Exposure" Rule For Determining "Time of Injury".

The Director submits that the "time of injury" in this case must be 1972, or the date of last exposure (Dir. Br. 17). However, *before* the 1984 Amendments, the Courts confirmed that the "time of injury" is *not* the date of last exposure in claims involving occupational disease. See, *Castorina v. Lykes Bros. SS Co.*, 758 F.2d 1025, 1031 (5th Cir.), *cert. denied*, 474 U.S. 846, 106 S.Ct. 137 (1985); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289-91 (9th Cir. 1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910 (1984). Further, as noted in Petitioners' opening brief, Congress in 1984 specifically chose to *reject* the date of last exposure as the "time of injury" for occupational disease cases. (Pet. Br. 16-19).

Finally, if the Director is correct, then the Act is *silent* as to the "time of injury" for calculating compensation for claims for occupational disease which *does* immediately cause death or disability. See, *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1566-67 (11th Cir.

1991). While the Director points to the date of last exposure as the "time of injury", the Act certainly does not specify this and Congress appears to have rejected this date as the "time of injury". In short, the Director's argument that the date of last exposure is the "time of injury" is unsupported by the Act, contrary to Congress' express intent and inconsistent with established case law.

4. The Director Is Entitled To No Deference.

There exists considerable disagreement among the Circuits as to whether the Director's interpretation of the LHWCA is entitled to any deference. This Court has not addressed this question. See *Dir., Office of Wkrs. Comp. v. Gen. Dynamics Corp.*, 900 F.2d 506, 510 (2nd Cir. 1990).⁴

This Court addressed the general question of deference to an agency in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). The first inquiry is whether Congress has directly addressed the issue in dispute. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. If Congressional intent is clear, the inquiry ends and the Court must give effect to this unambiguous intent. *Id.* Conversely, if Congress has not addressed the precise question at issue, the Court must ask whether the agency's interpretation is based on a permissible construction of the statute. *Id.* If so, the Court

⁴ The First Circuit has not addressed this question, either in this case or elsewhere. While the First Circuit accepted the Director's argument, it did not do so because of "deference", although the Director briefed this argument before the First Circuit.

may not substitute its own construction of a statutory provision for a reasonable one made by an agency. *Id.*

Initially, BIW submits that the intent of Congress in this case is clear. Section 8(c)(23) applies notwithstanding §8(c)(13). Section 908(c)(23) applies because §910(i) applies, as that provision, read as a whole, confirms that the "disability" at issue did not immediately result since it did not exist until 1983. Therefore, this Court should not defer to the Director.

However, even if the statute is ambiguous, the Director's argument is entitled to no deference.

As noted, the Circuits are split on the question of deference to the Director in cases involving the LHWCA. Four Circuits appear to defer to the Director's interpretation of the Act where statutory provisions are ambiguous. *Newport News Shipbuilding & Dry Dock v. Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046 and n. 23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170, 103 S.Ct. 815 (1983); *Peabody Coal Co. v. Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Force v. Director, OWCP, Dept. of Labor*, 938 F.2d 981, 983 (9th Cir. 1991).

Conversely, the Second and Third Circuits do not defer to the Director in such cases. *Dir., Office of Wkrs. Comp. v. Gen. Dynamics Corp.*, 900 F.2d 506, 510 (2nd Cir. 1990); *Director, Office of Wkrs. Compensation v. O'Keefe*, 545 F.2d 337, 343 (3rd Cir. 1976). The Sixth Circuit deferred to the Director in *Saginaw Min. Co. v. Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987), but subsequently agreed with the Third Circuit that such deference is inappropriate. *Director, OWCP v. Detroit Harbor Terminals*, 850 F.2d 283, 287

(6th Cir. 1988); *American Ship Bldg. v. Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989).

BIW submits that the Third Circuit's rationale in *O'Keefe*, as recently adopted by the Second Circuit in *General Dynamics*, is most persuasive. The Second Circuit was persuaded by the observation that Congress had divided responsibility for administering the Act into two separate offices of the Department of Labor, the Board and the Director. The Court in *O'Keefe* noted that, while the Director *was* authorized by Congress to administer the statute, it is the ALJ and Board and not the Director who resolve disputed legal issues involving the Act. *O'Keefe*, *supra*, 545 F.2d at 343. The Court further observed that the Director brings no special expertise where, as here, statutory construction is at issue. *Id*; *General Dynamics*, *supra*, 900 F.2d at 510. Finally, the Second Circuit observed as follows:

Further, when the Director appears as a litigant in an adversarial proceeding before the Board it is inappropriate to grant special deference to the Director's litigating position, particularly when that position has not been articulated in a more objective context through the promulgation of regulations. If deference were accorded under such circumstances, claimants would be effectively deprived of the right to impartial review.

General Dynamics, *supra*, 900 F.2d at 510. See also *Martin v. OSHRC*, 499 U.S. ___, 113 L.Ed.2d 117, 111 S.Ct. 1171 (1991) (no deference to agency's litigating position).

This conclusion is particularly compelling in this instance. The issue in this case does not concern a regulation promulgated by the Director, or the making of policy, or even a specific delegation of administrative discretion to the Director. See, e.g., *Martin v. OSHRC*, *supra*. Instead, the Director's argument is one that was adopted in litigation. It is premised upon a *medical* conclusion concerning hearing loss and a *legal* conclusion concerning Congressional intent. There is nothing about the Department of Labor's grant of power to the Director⁵ to suggest that the Director brings any greater understanding or expertise concerning medical facts or legislative intent than does any other party to this proceeding.

The Director, however, submits that in promulgating 20 C.F.R. §702.212 he "clearly expressed his view that hearing loss is not subject to Section 8(c)(23)" (Dir. Br. 27). That rule affords 30 days or one year from the "date of injury" in which to provide notice. It is reproduced in the Director's Brief at App-4a.

It appears, however, that this rule merely implements the legislation that is the subject of the dispute. The rule confirms that the "date of injury" for a hearing loss claim occurs when the employee receives an audiogram. This is consistent with §908(c)(13). However, the provision

⁵ 33 U.S.C. §939(a) authorizes the Secretary of Labor to administer the Act and to make rules and regulations. 20 C.F.R. §701.202 transfers to the Director all functions of the Department of Labor with respect to the administration of benefits programs under the Act.

expressly applies only "[f]or other than occupational diseases described in (b)". Subsection (b), in turn, allows one year in which to give notice in claims for "occupational disease which does not immediately result in disability". Thus, like §912(a), the Director's regulation affords a longer notice period (one year versus thirty days) for retired employees with diseases that do not immediately result in "disability". Hearing loss *may* be such a disease where an employee remains unaware of his disability or its work-relatedness until after retirement. Thus, the intent of the Director appears to be every bit as clear as that of Congress.

Finally, even if the Director's argument is otherwise entitled to deference, it should be rejected in this case because it is not based upon a reasonable construction of the Act. The Director's solution is contrary to Congress' intent and is premised upon an unreasonable construction of the Act.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the decree issued by the First Circuit be reversed and the matter remanded to calculate benefits under Section 908(c)(23).

Respectfully submitted,

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